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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

WARNER CABLE COMMUNICATIONS INC.,

Petitioner,

—v.—

CITY OF NICEVILLE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

QUESTIONS PRESENTED

1. Whether any First Amendment issue is raised when political officials create a government cable television system and use a city's sovereign powers—including the powers of taxation, subsidization and regulation—to drive all private cable speakers from the marketplace?

2. Whether it is consistent with the First Amendment for a government cable system to compete with a private cable speaker, even on fair terms, in a market which can support only one cable system and where the government will become the only cable speaker heard by a city's citizens?

3. Whether, under this Court's decision in *City of Los Angeles* v. *Preferred Communications, Inc.*, 476 U.S. 488 (1986), a private cable system about to be driven from the market by a government cable system is entitled to a trial on the First Amendment issues framed by the pleadings and summary judgment motion: (1) Will the government employ predatory tactics that will drive all private cable speakers from the market; (2) Can the market sustain more than one cable system; (3) Is the government motivated to exclude the private cable system because of objections to its exercise of editorial discretion and the content of its programs; (4) Can the government demonstrate a strong or compelling state interest in supplanting the only private cable speaker with a government controlled cable speaker; and (5) Are the means the government has chosen to achieve its goals narrowly tailored and the least restrictive means available?

PARTIES TO THE PROCEEDING

Petitioner, the plaintiff in the district court and appellant in the court of appeals, is Warner Cable Communications Inc.* Respondent, the defendant in the district court and appellee in the court of appeals, is the City of Niceville, Florida.

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* Warner Cable Communications Inc. is wholly owned by Warner Communications Inc., a wholly-owned subsidiary of Time Warner Inc. The subsidiaries of Warner Cable Communications Inc., excluding wholly-owned subsidiaries, include Palm Springs Communications Corporation, Warner Cable Communications of Cincinnati, Inc., Gulf Coast Cable Television, Warner Cable Communications of Greater Akron, Warner Cable Communications Company of Queens, Warner Cable Communications Company of Brooklyn and Warner Cable Communications Company of Greater Cincinnati.

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CITY OF NICEVILLE,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Warner Cable Communications Inc. ("Warner") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-19a) is reported at 911 F.2d 634. The two opinions of the district court in this case (App. 20a-53a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 12, 1990 (App. 1a). A petition for rehearing was denied on November 16, 1990 (App. 54a-55a). On January 25, 1991, Justice Kennedy extended the time for filing a petition for a writ of certiorari to and including March 15, 1991.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in relevant part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press . . .

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law . . .

STATEMENT

Warner has provided cable television services in Niceville and surrounding areas in Okaloosa County, Florida, for approximately two decades. It offers 44 channels of programs. More than 80% of the homes in Niceville subscribe to Warner's system.

In 1985, the Niceville City Council passed an ordinance authorizing the municipal government to construct and operate its own cable television system. Local political officials objected to certain of Warner's policies as to religious programs. They promised that the City's system would charge lower prices to subscribers than Warner charges. The City system can charge lower prices only if it operates below cost. Niceville's cable expert stated that the City's system would require "cross-subsidies" from "other [municipal] resources" (App. 90a) and council members predicted a "shortfall" (App. 76a-78a; *see also* 90a). Similarly, Niceville representatives testified the City was not concerned with making a profit (App. 78a, 87a). Niceville's consultants predict that this below-cost pricing will result in the government's subsi-

dized system capturing 75% of Warner's subscribers in the first year alone (App. 75a).

Warner alleged that Niceville would use an arsenal of discriminatory advantages, including the subsidization of the City system from the government's general funds, in order to destroy Warner as a cable speaker in the community, leaving the City as the only speaker. The Chairman of Niceville's Cable Committee stated that the City would employ its regulatory powers to disadvantage Warner and "there is not gonna be a competitive system in Niceville" (App. 75a, 79a).

Warner further alleged that the Niceville market could support only one cable television system and that the City would be the sole cable speaker. Niceville denied these allegations. The court of appeals denied Warner the right to a trial of these issues.

Warner's Cable Operations in Niceville

Warner exercises broad editorial discretion in selecting and originating programs in Niceville. It communicates with the public on a wide variety of topics including news, information, public affairs, and religious and entertainment programming. Warner originates programs in its own studio, affords access to third-party speakers, and selects television stations and specialized cable program services, such as CNN and C-Span which feature twenty-four hours of news and public affairs. Warner, exercising its editorial discretion, makes selections from more than 70 satellite program services.[1]

Warner's locally originated programs include debates and discussions of issues of community interest, reports of election and primary returns, important council meetings in the area, various public events (such as recent local demonstra-

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1 *See* Report of the Federal Communications Commission ("FCC") *In the Matter of Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Services*, 67 Rad. Reg. 2d (P&F) 1771, Appendix G at 1843 (1990) ("FCC 1990 Report").

tions and speeches concerning the Gulf War), educational events, local business and commercial news, religious services, sports activities, fund-raising functions, and information as to other events of local interest.[2]

Warner operates under a non-exclusive cable franchise granted by the City of Niceville.[3] The City imposes an annual franchise fee of five percent of Warner's gross revenues from subscribers. In addition, under the franchise, the local political officials possess sweeping regulatory powers over virtually every aspect of Warner's cable system—powers which they exercise in their unfettered discretion.

The franchise (App. 56a-71a) gives the City Council the authority to regulate Warner's rates and services to subscribers.[4] The local political officials put pressure on Warner concerning editorial and programming decisions.[5] They exercise close regulatory surveillance over Warner's television distribution system, maintenance, repairs and customer services. They have the unlimited discretion to compel Warner to extend, at its own expense, the cable distribution system to subscribers in "remote" and "inaccessible" areas. The City has the right to inspect Warner's books and records and has access to confidential business information about Warner's

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2 Cable systems across the nation are increasing local origination of information and news services. *See N.Y. Times*, April 14, 1990, at 33; *Electronic Media*, Nov. 5, 1990, at 1; *Cable tv Business*, Sept. 15, 1990, at 27; *Newsday*, Feb. 23, 1988 (Nassau and Suffolk Ed.) Pt. II, at 3. The National Telecommunications and Information Administration of the Commerce Department recently stated: "Cable has shifted from its early role as a broadcast antenna service focused on facilities, to an original programming service . . . ." *Video Program Distribution and Cable Television: Current Policy Issues and Recommendations* (June 1988) at i ("NTIA Report"). Warner will prove at trial that, like other cable systems across the nation, it is increasing local news, public affairs and other informational programs in Niceville.

3 Warner originally operated under a non-exclusive franchise granted by Niceville in 1971. In 1980, Niceville granted Warner a second non-exclusive franchise that extends until 1995.

4 See n.7, *infra*.

5 See p. 5, *infra*.

operations. Finally, the City has the ultimate power over Warner—to deny a renewal of its franchise to operate the business of disseminating news, information and entertainment via cable television.

Niceville's Plan to Compete with Warner

In 1984, Niceville awarded a cable franchise to Cosmic Communications, Inc. ("Cosmic"), a company controlled by local residents. Since both privately-owned systems would be competing on even terms, Warner did not oppose the grant of a franchise to Cosmic.

In 1985, however, the Niceville City Council passed an ordinance authorizing the municipal government to construct and operate its own cable system. The local political officials expressed various motives for launching a municipal system including, among other things, objections to Warner's editorial judgment and policies as to religious programming (specifically, Warner's decision to drop the Praise the Lord's Inspirational Network featuring Jim and Tammy Bakker) and to the notion that New York City executives were making programming decisions for residents of the Florida panhandle (App. 76a, 80a-81a, 87a).

Upon learning of the City's plan to construct its own system, Cosmic surrendered its franchise, recognizing its inability to compete against a government-subsidized system. Niceville then selected Cosmic to act as the City's cable consultants. The City, assisted by Cosmic, promptly entered into nineteen affiliation agreements, each for a three-year term, with various program suppliers, thereby filling most of the municipal cable system's schedule (App. 82a-86a). One of the first program services signed up by Niceville was the Jim and Tammy Bakker network that Warner had dropped despite the strong protests of the local political officials (App. 83a-87a).[6]

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6 In 1986, after Niceville had selected nineteen program services under three-year affiliation agreements—constituting the bulk of the schedule for the municipal cable system—the local political officials went through the motions of appointing members of a board purportedly

The City, as Warner demonstrated below on the summary judgment motion, enjoys major competitive advantages over Warner which derive from its taxing, regulatory and other power. The City intends to use those advantages to oust Warner from the market.

Niceville will resort to general municipal funds to subsidize the City's below-cost pricing strategy. The City's own expert testified it would have to cross-subsidize operating deficits from general tax revenues (App. 90a-91a; *see also* App. 76a-78a, 92a-93a). Council members acknowledged that the Niceville system, like a nearby municipal system, would experience "shortfalls" that would have to be subsidized (App. 76a-78a; *see also* App. 90a, 92a-93a). In addition, the City will resort to tax revenues to meet its obligations under the $2,000,000 bond issue floated to construct its cable system (App. 72a-74a, 88a-89a).

The City will impose a tax or franchise fee of five percent of Warner's gross revenues; the City will bear no similar economic burden. The City's system will enjoy tax immunity; Warner, by contrast, pays property, sales and income taxes. The City has access to especially favorable financing, not available to a privately-owned company, by pledging its tax revenues (App. 78a, 88a). The City intends to use its regular municipal facilities to promote and favor its cable system (App. 90a). Niceville enjoys other major advantages over Warner, including the authority to regulate Warner's rates, which gives it a "big hammer" according to Councilman Brown who heads the City's Cable Committee.[7] The City

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responsible for choosing programs for the City's system. The Mayor selected two members; each council member selected one. These political appointees each serve terms of three years (the length of the program affiliation agreements already entered by the City).

7 Councilman Brown stated: "The big hammer on the franchise was originally the rate control; if you're controlling somebody's money, you are controlling them" (App. 80a). The district court concluded that there was an issue of fact as to whether Niceville still had the legal power to exercise rate regulation under the franchise because of FCC

exercises pervasive regulatory powers over virtually every aspect of Warner's cable operations. Finally, the City has the ultimate power over Warner—the power to refuse to renew its franchise.

The record below shows that the City intends to use its taxing and other powers to drive Warner out of business (App. 93a). The City can price its competing services artificially below cost because it has access to tax revenues to cover operating deficits and to repay the construction cost of its cable system. The City will use its deficit-pricing strategy to capture 75% or more of Warner's customer (App. 75a). The Chairman of Niceville's Cable Committee admitted that if faced with the need to raise taxes or an opportunity to disadvantage Warner by regulatory powers, "I would have to fight for the [City's] system" (App. 79a). He added "there is not gonna be a competitive system in Niceville" (App. 75a).

Warner's Lawsuit Against Niceville

In November 1985, Warner filed a complaint against Niceville alleging, among other things, violations of its rights under the First and Fourteenth Amendments. Warner asserted that the City planned to "chill and eventually completely deprive [Warner's] freedom of expression and communication of ideas, expression and entertainment" by making its operations economically infeasible (Complaint

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regulations issued pursuant to the Cable Communications Policy Act of 1984 (47 U.S.C. §§ 521-559 (Supp. V 1987)) ("the Cable Act"). Under those regulations, cable rates cannot be regulated if a cable system is subject to "effective competition," which the FCC defined to mean competition from three television stations that provide Grade B signals or that are significantly viewed in the community (App. 24a). Warner contended it was still subject to rate regulation; the City denied it still had the power to regulate rates. In any event, a proposal is now pending before the FCC that would indisputably give Niceville the power to regulate Warner's rates. *Further Notice of Proposed Rulemaking*, MM Docket No. 90-4, 56 Fed. Reg. 406 (January 4, 1991).

¶ 19). Warner further alleged that the City intended to become the "sole provider of cable television services to the citizens of Niceville" (*Id.* ¶ 25). Warner also alleged violations of its due process rights because the City would pervasively regulate Warner while simultaneously competing against it (*Id.* ¶ 34).

The City moved for summary judgment. The district court concluded that the First Amendment claim raised issues of fact, including whether the City would definitely drive Warner out of business and whether the Niceville market could economically support more than one cable system (App. 41a). The district court stated that "there are a variety of factors that will influence the outcome of this competition [between the City and Warner] that cannot be determined at this point" (App. 41a). Instead of ordering a trial on these disputed factual issues, the district court avoided the constitutional question by ruling that the First Amendment claim was not "ripe" because Warner's right to speak had not yet been "totally suppress[ed]" (App. 41a).

The district court denied the summary judgment motion on the due process claim and, in a subsequent bench trial, dismissed the claim on the ground that Warner had not yet suffered impairment of its rights (App. 20a, 47a).

Warner appealed from the district court's decisions. Warner's argument on the First Amendment claim in the court of appeals—and the City's response—focused almost exclusively on whether this issue was "ripe," not on the merits of the free speech issue. The court of appeals, disagreeing with the district court, correctly concluded that the First Amendment issue was ripe (App. 5a).[8] But the court then proceeded, *sua sponte*, to address the merits of the First Amendment claim,

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8 The law clearly supports this conclusion. *See, e.g., Michigan State Chamber of Commerce* v. *Austin*, 788 F.2d 1178, 1182-1185 (6th Cir. 1986) ("When a reasonable likelihood is established that events which will trigger the prohibited acts will occur, resulting in enforcement of a statute in a way that arguably in infringes a plaintiff's First Amend-

even though the matter had not been fully briefed or argued on appeal and even though the district court had found material factual issues relevant to a First Amendment analysis.

In a sweeping pronouncement, the court of appeals declared:

> We conclude that Warner fails to assert a protected First Amendment interest *even if* the projected City-owned system will *surely* render Warner's continued operation in Niceville economically infeasible.

(App. 5a) (emphasis added). In laying down that broad rule, the court of appeals reasoned that "economic loss" (no matter how unfair or devastating) caused by competition with an advantaged government speaker cannot, as a matter of law, give rise to a cognizable First Amendment claim. Destruction of the only private cable speaker in the marketplace and discouraging a potential private entrant by subsidized government competition was *per se* constitutional in the view of the court of appeals.

At a later point in its opinion, the court of appeals theorized that "the government may not speak so loudly as to make it impossible for other speakers to be heard" by, for example, using a soapbox with "powerful loudspeakers" (App. 8a). The court, however, concluded that this principle was not germane here because the sort of drowning out at issue is an economic one, achieved through unfair competition, rather than a physical one, achieved through loudspeakers or megaphones. The court thus limited First Amendment protection to physical drowning out and found it unnecessary to address the undisputed evidence that the City

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ment rights, a concrete dispute has been presented"); *Morial* v. *Judiciary Comm'n.*, 565 F.2d 295, 298 (5th Cir.) (*en banc*) ("Pre-conduct challenges to the validity of laws burdening first amendment rights are among the essential bulwarks of a system of free expression"), *cert. denied*, 435 U.S. 1013 (1977); 13A Wright, Miller & Cooper, *Federal Practice & Procedure* § 3532.3 at 159 (2d ed. 1984) ("First Amendment rights are particularly apt to be found ripe for immediate protection").

enjoys major competitive advantages over Warner, which will result in its cable speech being drowned out.

Concluding that there was no burden on Warner's First Amendment rights, the court of appeals stated "we need apply no balancing test to the City's action" (App. 11a). In other words, the appellate court concluded it need not decide whether the local political officials had established a strong or compelling state interest for their action and adopted narrowly tailored means to achieve that interest.

The court of appeals also opined, without support, that the local political officials did not "target the content of Warner's speech" (App. 5a n.4). The record, however, contains undisputed evidence that the local political officials were hostile to Warner's editorial judgments and policies as to religious programming and to the notion that New York City executives made programming decisions for Niceville's residents.[9]

Warner's petition for rehearing asked that the case be remanded for trial so it would have its day in court—an opportunity to obtain a favorable resolution of the disputed factual issues that the district court concluded were relevant to a First Amendment analysis.[10] Alternatively, Warner requested rehearing so it could fully brief and argue the merits of the First Amendment claim because the briefs and argument on appeal focused on ripeness, not the merits of the free speech question. The court of appeals denied rehearing.

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9 The court of appeals also ruled that dismissal of Warner's due process claim was warranted because it was not ripe at this time (App. 12a). Warner does not now seek separate review of the due process issue except to the extent that due process considerations are intertwined with the First Amendment concerns raised in this petition.

10 The district court, as noted, did not order a trial on these factual issues because of its erroneous conclusion that the First Amendment claim was not ripe.

REASONS FOR GRANTING THE PETITION

This case merits plenary review because the court of appeals, contrary to numerous decisions of this Court including *City of Los Angeles* v. *Preferred Communications, Inc.*, 476 U.S. 488 (1986), laid down drastic and erroneous principles of First Amendment law that permit government suppression of cable television speakers.

There are three reasons for granting the petition.

First, the court of appeals denied Warner a trial on the radical proposition that "Warner fails to assert a protected first amendment interest even if the projected City-owned system will surely render Warner's continued operation in Niceville economically infeasible" (App. 5a). The conclusion that when government intentionally silences a speaker by regulation and unfair economic competition, there is never a claim under the First Amendment is supported by no case law, contradicted by numerous decisions, and cannot withstand analysis.

Second, a trial is required to frame the issue whether, in a market that can support only one cable system, government, even without unfair advantages, may compete with a private speaker if the result will be that government becomes the sole speaker. Warner alleged that the Niceville market could sustain only one cable system, the City denied it, and the trial court concluded that there was a contested factual issue. Nevertheless, the court of appeals, without a record, simply assumed that Niceville could support more than one cable system. A crucial legal issue was thus improperly evaded.

Third, having ruled that destructive government competition could never violate the First Amendment, the court of appeals concluded that it need not engage in a balancing test to determine whether the City's action was justified by a strong or compelling state interest and whether Niceville had adopted narrowly tailored means to achieve that interest. That is clear error.

Denying Warner a trial on that issue, among others, is in direct opposition to this Court's decision in *Preferred*. That decision held that a cable speaker has First Amendment rights, that a City might have interests which would justify excluding the cable speaker from the marketplace, and, hence, that a trial of the facts was required. The Eleventh Circuit flatly refused to consider whether the City had a justification for its action or had adopted narrowly tailored means.

The court also denied Warner a trial on other critical First Amendment issues—whether the City would drown out its speech by unfair competitive leverage; whether Niceville was a market that could support only one cable system; and whether the City's action was motivated, at least in part, to punish Warner for the content of its speech. The court of appeals avoided these factual issues by laying down a drastic and incorrect rule of law and by making factual assumptions not supported by the record. *Preferred* is not satisfied by substituting appellate fact-finding for a trial.

The judgment of the court below is in flat conflict with numerous decisions of this Court and basic First Amendment principles. That judgment is certain to encourage the growing trend of city governments establishing their own cable systems, driving private cable speakers out of the market, and ensuring that only government speech will be heard on this important medium. Other municipalities will follow Niceville's example, if the opinion below is allowed to stand. The threat of supplanting private speech by government-owned cable systems is, in fact, increasing dramatically.[11]

This creates the danger that local political officials will become the gatekeepers for the dissemination of video news,

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11 In 1989, there were reportedly 10 communities with privately-owned cable systems where local governments were considering building rival, city-owned cable systems. Kagan, *Cable TV Franchising*, July 31, 1989, at 6. By last fall, there were reportedly 36 such cases. Kagan, *Cable TV Franchising*, October 31, 1990, at Supp. 2-6. Today, there are reportedly 84 such cases according to recent Kagan research.

information, and religious and entertainment programs. This poses particularly grave First Amendment problems in communities such as Niceville which do not have local television stations and rely so heavily on local cable systems. It is crucial to the public's First Amendment rights, as well as to the free speech rights of cable television, that this Court review the judgment below, establish guidelines for lower courts, and remand for trial.

I.

WARNER DID NOT LOSE ITS FIRST AMENDMENT RIGHT TO SPEAK BECAUSE NICEVILLE ELECTED TO SILENCE IT BY PREDATORY ECONOMIC COMPETITION RATHER THAN BY AN OUTRIGHT BAN ON ITS ABILITY TO SPEAK.

This Court's decision in *Preferred* establishes that a government's exclusion of a cable speaker from the marketplace "implicate[s] First Amendment interests" because "through original programming or by exercising editorial discretion over which stations or programs to include in its repertoire, [cable operators] seek to communicate messages on a wide variety of topics and in a wide variety of formats." 476 U.S. at 494. The Court said: "Cable television partakes of some of the aspects of speech and the communication of ideas as do the traditional enterprises of newspaper and book publishers, public speakers, and pamphleteers." *Id.* at 494.[12] The

12 The courts of appeals for the various circuits have, in the past decade, uniformly treated cable program distributors as First Amendment speakers because they originate, select and disseminate news, information and entertainment. *See, e.g., HBO* v. *FCC*, 567 F.2d 9, 43-51 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977); *Quincy Cable TV, Inc.* v. *FCC*, 768 F.2d 1434, 1444-5, (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986); *Midwest Video Corp.* v. *FCC*, 571 F.2d 1025, 1052-57 (8th Cir.), *cert. granted*, 439 U.S. 816 (1978), *aff'd on other grounds*, 440 U.S. 689 (1979); *Omega Satellite Products* v. *City of Indianapolis*, 694 F.2d 119, 127-29 (7th Cir. 1982); *Community Communications* v. *City of Boulder*, 660 F.2d 1370, 1378-80 (10th Cir. 1981), *cert. dismissed*, 456 U.S. 1001 (1982).

court of appeals here held, however, that "Warner fails to assert a protected first amendment interest even if the projected City-owned system will surely render Warner's continued operation in Niceville economically infeasible" (App. 5a).

The court acknowledged that it was making new law: "After *Preferred*, the full contours of a cable operator's first amendment right remain unshaped. Whatever those contours may be, however, we conclude that the right to be free of competition is not within them, even when the cable operator's most formidable competitor is a municipality" (App. 6a). This peculiar reasoning rested upon the means by which the City chose to silence Warner: "Such economic loss, however, does not constitute a *first amendment injury*" (App. 7a) (emphasis the court's).

The court adopted as dispositive a distinction that is without significance in First Amendment jurisprudence, *i.e.*, since Warner was not formally forbidden to speak, it did not matter that economic loss intentionally inflicted by a government-subsidized system would make it impossible for Warner to speak. That is "shaping the contours" of the First Amendment right recognized in *Preferred* with a vengeance. It defies prior rulings of this Court, holding that unconstitutional restraints need not constitute direct prohibitions of speech but may result from more "subtle" and less "familiar or traditional" means.[13]

The sweep of the new First Amendment rule created by the court of appeals is shown by the fact that Warner had intro-

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13 *Bates* v. *Little Rock*, 361 U.S. 516, 523 (1960) (First Amendment rights "are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference"); *Miami Herald Publishing* v. *Tornillo*, 418 U.S. 241, 256 (1974) ("Governmental restraint on publishing need not fall into familiar or traditional patterns to be subject to constitutional limitation on governmental powers"); *CBS* v. *Democratic Nat'l Comm.*, 412 U.S. 94, 168 n.18 (1973) (Douglas, J., concurring) (The Court has repeatedly struck down various forms of "indirect restrictions" that "discouraged or chilled constitutionally protected rights of speech").

duced substantial evidence in the district court that Niceville intends to give its cable system advantages, such as access to tax subsidies and freedom from the heavy franchise fees that Warner must pay, with the clear intention and inevitable effect of driving Warner from the market so that the government's cable system will be the only cable speaker in the community.

Contrary to the panel's holding, this Court has consistently held that government can be guilty of inflicting First Amendment injury by imposing economic loss. *See, e.g.*, *New York Times* v. *Sullivan*, 376 U.S. 254, 270 (1964) (economic burdens from excessive defamation judgments chill "uninhibited, robust, and wide-open" debate); *Riley* v. *National Fed'n of the Blind*, 487 U.S. 781, 794 (1988) (economic limitations on fundraising expenditures "may well drive professional fundraisers out of North Carolina" and the resulting "restriction is undoubtedly one on speech and cannot be countenanced"); *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (economic limitations on election expenditures invalidated); *Speiser* v. *Randall*, 357 U.S. 513 (1958) (economic penalty for speech invalidated); *Minneapolis Star & Tribune Co.* v. *Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983) (tax on ink and paper for large newspapers invalidated); *Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U.S. 221 (1987) (discriminatory tax on general circulation magazines invalidated); *Grosjean* v. *American Press Co.*, 297 U.S. 233 (1936) (discriminatory tax on press invalidated).

The court below gave no reason, and none appears, why economic loss inflicted by government through predatory competition and sovereign advantages is not a First Amendment injury though it is acknowledged that economic loss inflicted by discriminatory taxation is such an injury. Indeed, here, the distinction between competition and taxation does not even exist because Niceville will impose discriminatory taxes. Warner is required to pay Niceville a franchise fee of five percent of its gross revenues while Niceville will bear no

similar burden.[14] This case is thus indistinguishable from *Arkansas Writers' Project*, *Minneapolis Star*, and *Grosjean*. It is also indistinguishable in principle from *Sullivan*, *Riley*, *Buckley* and *Speiser*.

The Eleventh Circuit's position is so extreme that the City of Niceville did not even argue it. It is easy to see why. The court's rule would allow any number of results utterly inconsistent with the First Amendment. Suppose a private individual owns the only television station in a municipality but the city government elects to build a second which it subsidizes with tax monies so that it can charge below-cost advertising rates. The result is to drive the only privately-owned station from the market. The panel's rule finds no problem in that. The court's principle would, in fact, hold that there is no First Amendment problem if the federal government bought a national cable system, subsidized it from the Treasury, and achieved a complete monopoly of cable throughout the United States.

The First Amendment cannot countenance such results and, for that reason, cannot countenance the court of appeals' new rule.

II.

A GOVERNMENT SPEAKER MAY NOT COMPETE WITH A PRIVATE SPEAKER IN A MARKETPLACE WHERE ONLY ONE CAN SURVIVE.

Warner has argued to this point that Niceville may not employ the weapons of sovereignty to ensure that no private speakers can survive in competition with the City's cable system. Warner submits, however, that a more stringent First Amendment rule is necessary: where a market will economically support only one cable system, government may not

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14 Warner also pays sales and property taxes to the City and income taxes to the State while Niceville is immune from all such taxes.

compete even on non-discriminatory terms to become the sole surviving cable speaker.

If this is a correct interpretation of the First Amendment, and we think the proposition self-evident, the issue of Niceville's ability to support more than one speaker is pivotal and trial is required on that issue. Despite the fact that the parties disagreed on this question, and the district court found a genuine issue of material fact (App. 42a), the court of appeals assumed that Warner's contention was factually wrong and the City's was correct.[15]

The court of appeals assumed that Niceville could support more than one system in attempting to distinguish this case from *Preferred*. In *Preferred*, the panel said, the City of Los Angeles was attempting to limit the market to one cable system and the relief sought by the petitioner would have increased speech in the marketplace. By contrast, the court of appeals said that the City of Niceville is trying to add a second speaker, itself, and Warner asks the courts to exclude Niceville, thereby decreasing speech (App. 11a-12a). This is to decide that two speakers can survive, as the City contends, thus ruling against Warner on the disputed factual question it has not been allowed to try.

Once more, this Court's decision in *Preferred* requires that the judgment of the Eleventh Circuit be reversed and the case remanded for trial. If, as Warner alleged, only one cable system can survive in Niceville, and should the survivor be the City's system, there will be no privately-owned video programmer in Niceville to comment on community issues or the

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15 Courts have found that certain communities can economically support only a single cable system. *See, e.g., Omega Satellite Products Co.* v. *City of Indianapolis*, 694 F.2d 119 (7th Cir. 1982) (Posner, J.); *Community Communications* v. *City of Boulder*, 660 F.2d 1370 (10th Cir. 1981), *cert. dismissed*, 456 U.S. 1001 (1982); *Central Telecommunications, Inc.* v. *TCI Cablevision, Inc.*, 800 F.2d 711 (8th Cir. 1986), *cert. denied*, 480 U.S. 910 (1987). Other authorities have questioned the validity of that economic theory. *See, e.g., NTIA Report* at 18-19; *FCC 1990 Report* at ¶ 99. Warner was entitled to a trial of this issue as it pertains to the particular circumstances of the market in Niceville.

local political process—core First Amendment functions. Since Niceville has no local over-the-air television station,[16] a local cable system offers the only potential means to provide video programs that cover local news and information.

The First Amendment requires, and the vitality of our democratic system depends on, a robust private press, not a government monopoly speaker. *See, e.g., Mills* v. *Alabama*, 384 U.S. 214, 219 (1966) ("the press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were elected to serve"); *FCC* v. *League of Women Voters of California*, 468 U.S. 364, 415 (1984) (Stevens, J., dissenting) ("In my judgment the interest in keeping the Federal Government out of the propaganda arena is of overriding importance. That interest is of special importance in the field of electronic communications, not only because that medium is so powerful and persuasive, but also it is the one form of communications that is licensed by the Federal Government").

III.

WARNER RAISED ISSUES OF MATERIAL FACT THAT, UNDER THE FIRST AMENDMENT AND THIS COURT'S DECISION IN *PREFERRED*, REQUIRE A TRIAL TO DEVELOP A RECORD.

At the heart of Warner's case are allegations of fact that the district court did not resolve and the court of appeals found unnecessary to resolve in order to reject Warner's First Amendment claim. In particular, Warner alleged—and offered substantial proof—that (1) Niceville's cable system

16 The nearest VHF television stations are located 45 to 100 miles away, in Mobile, Pensacola and Panama City. They do not provide coverage of local issues in Niceville. There is a UHF television station, Channel 35, in Fort Walton Beach, a nearby community. However, that station provides no news coverage, local or otherwise, and merely plans to retransmit the signals of a Pensacola station, 45 miles away.

would have unfair competitive advantages over Warner's systems and thereby make competition impossible; (2) Niceville is a market which can economically support only one cable television system; and (3) Niceville's decision to launch a cable television system was motivated, at least in part, by objections to Warner's editorial judgments and program content. Just as the First Amendment claim in *Preferred* required resolution of factual issues, so here the court of appeals could not properly dismiss Warner's First Amendment claim without a trial of these central factual issues.

The court of appeals also defied *Preferred* by flatly refusing to engage in a "balancing" test—to consider whether Niceville had established well-founded governmental interest to support its action and also demonstrated that it had adopted narrowly-tailored means to achieve such an alleged state interest. We consider, in turn, each of these issues requiring a trial under the First Amendment.

(1) Having concluded that Warner had no First Amendment interest in not being driven from the marketplace by government competition, the Eleventh Circuit panel underscored its ruling—that competitive injury is never cognizable under the First Amendment, no matter how unfair or destructive—by contrasting *physical* restraints on speech with *economic* inhibition of speech. The court agreed that "the government may not speak so loudly as to make it impossible for other speakers to be heard" by, for example, building a "better soapbox equipped with spotlights and powerful loudspeakers" (App. 8a). The court said this principle was inapplicable here because the drowning out would occur through competitive rather than physical means. That distinction is baseless. Here, Warner has profferred substantial evidence that Niceville will drown it out by its taxing, regulatory and other powers, just as surely as if the City drowned it out by blaring loudspeakers.

The economic factors leading to the City's drowning out Warner's free speech are not disputed. Niceville, as noted, charges Warner five percent of its gross revenues while

exempting its own cable system from a similar economic burden. Niceville imposes sales and property taxes on Warner but its own cable system will be tax-exempt. Niceville will subsidize its deficit operations and repay its construction bonds with general tax revenues.

Niceville will also operate its system without the regulatory burdens and heavy costs it imposes on Warner. The City's franchise gives Niceville the power to regulate virtually every aspect of Warner's activities. The City wields what it calls the "big hammer" of rate control.[17] The City seeks to restrict Warner's exercise of editorial discretion. The City requires Warner to extend service to "remote" and "inaccessible" areas and prevents Warner from recovering its costs for such extensions. The City has the right to review annually Warner's confidential financial, marketing, and technical information. The City has the power to refuse to renew Warner's franchise.

To top it all off, Niceville has authorized the issuance of revenue bonds in the sum of $2,000,000 to construct the City's cable system. The bonds, backed by sales taxes and entitlement funds from the State of Florida, will be sold to Niceville residents. Those bondholders will have a powerful economic incentive to prefer the City's system in which they have a financial stake. Indeed, all Niceville residents—whether or not bondholders—will have a strong motive to prefer the City's system over Warner's system in an effort to forestall the City from raising higher taxes to operate its deficit system. The members of the City Council will also have a powerful political incentive to make sure that the City's cable operation is the survivor in the unfair competitive contest with Warner.

The Chairman of the City Council's Cable Committee, as noted, testified that he would impose regulatory restraints on Warner if necessary to uphold the City's promise to operate its own system with lower subscriber rates than Warner's: "I

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17 See note 7 *supra*.

would have to fight for the [City's] system, if that's what you're asking" (App. 79a). He confidentially assured the other City Council members "there is not gonna be a competitive system in Niceville" (App. 75a).

Niceville's promise of low prices can be kept only by the tax subsidies and other discriminatory benefits it will confer on its own cable system and by the discriminatory economic burdens it will place upon Warner. Warner will have to compete against a government soapbox operated on a subsidized, below-cost pricing strategy. If Niceville can suppress private cable speech by government leverage, then any other community in the United States can similarly supplant free speech.

The facts about the impact of the City's unequal, subsidized "soapbox" must be tried because the law is clear that public officials may not eliminate private speakers by wielding the weapons conferred by sovereignty. *See, e.g.*, L. Tribe, *American Constitutional Law* 807 (2d ed. 1988) (the government may add its voice to private voices "provided it does not drown out private communication"); T. Emerson, *The System of Freedom of Expression* 712-713 (1970) ("very easy to visualize situations in which the government's voice may overwhelm or displace all others and thus seriously distort the system of free expression"); S. Shiffrin, *Government Speech*, 27 UCLA L. Rev. 565, 607 (1980) ("If a system of free expression is to be preserved, either custom, or statutes, or constitutionally based limitations must provide assurances that government speech will not unfairly dominate the intellectual marketplace"); M. Yudof, *When Government Speaks* xv (1983) ("If government dominates the flow of ideas and information, the ideal of the self-controlled citizen, making informed choices about his government, is destroyed").

This Court has long recognized these basic First Amendment principles. *See, e.g., Red Lion Broadcasting* v. *FCC*, 395 U.S. 367, 387 (1969) (no right to "snuff out the free speech of others" or monopolize the electronic media); *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 788 n.17 (1978) (corporate advocacy, if it drowned out private speech,

"would merit our consideration"). *See also NAACP* v. *Hunt*, 891 F.2d 1555, 1566 (11th Cir. 1990) ("government may not monopolize the marketplace of ideas"). *Compare United States* v. *American Tel. and Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland* v. *United States*, 460 U.S. 1001 (1983) (prohibiting AT&T from entering electronic publishing because of dangers of destroying competition by charging higher tariffs to competitors than to its own operations). AT&T's competitive leverage parallels Niceville's leverage—leverage which poses a threat to the survival of private cable speakers in the City.

The court of appeals should have ordered a trial on the issue of the devastating impact of the City's superior "soapbox" built on tax subsidies, discriminatory tax burdens and sweeping regulatory powers. The City has unfair leverage and the intent to drown out two private cable speakers—Warner and Cosmic, the potential new entrant.

(2) The court of appeals rejected Warner's untried allegation, which the City denied, that Niceville can sustain only one cable system, even though the district court held this raised a material issue of fact (App. 42a). This issue, as shown above (*see* pp. 16-17), is central to a principled analysis of the First Amendment question.

(3) Warner is also entitled to a trial to determine whether the local political officials decided to displace Warner because of objections to its exercise of editorial discretion and program content. In particular, Council members strongly objected to Warner's decisions as to religious programming (specifically, its decision to drop the Jim and Tammy Bakker Inspirational Network) (App. 76a, 80a-81a, 87a). Indeed, when Niceville decided to build its own cable system, one of the first program services it signed up was the Jim and Tammy Bakker religious network (App. 83a-87a). The local political officials also objected to the notion that

New York City executives were making programming decisions for Niceville residents (App. 81a).[18]

Despite this evidence of censorial intent, the court of appeals incorrectly found, without explanation or record support, that "Warner implicitly recognizes that Ordinance 581 [authorizing the municipal system] does not target the content of Warner's speech" (App. 5a). Instead of making conclusions contrary to the record, the court of appeals should have remanded for a trial as to whether the City's action was motivated, in whole or part, by objections to Warner's exercise of editorial discretion and program content. Conduct aimed at content, of course, would raise the most troubling First Amendment concerns. *See FCC* v. *Midwest Video Corp.*, 440 U.S. 689, 707 (1979) ("Cable operators now share with broadcasters a significant amount of editorial discretion regarding what their programming will include").[19] This issue surely demands strict judicial scrutiny, not cavalier assumptions by the court of appeals which are contrary to the record.

(4) *Preferred* also requires a trial to test the government's purported justifications for what it proposes to do in Niceville as well as Warner's claim that the City had less restrictive methods available to achieve its purported goals—methods less destructive of free speech. *Preferred* specifically remanded for trial on those very issues. Here, Niceville contends that it needs a City-owned cable system to offer better programming than Warner's system and to offer special two-way interactive services (*e.g.*, burglar alarms, traffic light

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18 In fact, many programming decisions are made by Warner's local management in Niceville according to its judgment of the viewers' needs and interests.

19 *See also Members of the City Council of Los Angeles* v. *Taxpayers for Vincent*, 466 U.S. 789, 804 (1984) ("First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others"); *Consolidated Edison of New York, Inc.* v. *Public Serv. Comm'n of New York*, 447 U.S. 530, 536 (1980) ("Governmental action that regulates speech on the basis of its subject matter slip[s] . . . into a concern about content' ") (quoting *Police Dep't of Chicago* v. *Mosley*, 408 U.S. 92, 99 (1972)).

controls, water-well metering, etc.). These are not interests that justify making the government the monopoly cable speaker in town.

The City contended below that, under *United States* v. *O'Brien*, 391 U.S. 367 (1968), it had merely to show that the interests served were important. (The City, unlike the court of appeals, at least recognized that First Amendment rights were at stake.) Warner submits that the City must meet standards much more stringent than those of *O'Brien*.

This is not a case like *O'Brien* where generally applicable legislation happens to impair indirectly some speech or press freedom. This is a case of government action directed specifically at a private speaker and a potential private entrant and designed to silence that speaker and entrant forever. Moreover, Warner will prove at trial that Niceville was motivated, at least in part, by a desire to affect its editorial judgments and program content.

But there is an additional reason why Niceville's action must be subject to the strictest judicial scrutiny. This case does not involve discrimination by government between two private speakers but discrimination by government against a private speaker and in favor of itself. In *United States Trust* v. *New Jersey*, 431 U.S. 1 (1977), a Contracts Clause case, the Court said: "Complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake." *Id.* at 25-26. If a State's impairment of the obligation of its own contract receives stricter scrutiny than its impairment of contractual obligations between private persons, surely government's self-interested decision to favor itself as a speaker should require much stricter First Amendment scrutiny than its decision to favor one group of private speakers over another. When a government discriminates against private speech in favor of its own speech, assuming that it may do so at all, government should have to meet a compelling interest standard.

(5) Finally, *Preferred* requires a trial to determine whether Niceville has adopted narrowly tailored means to achieve a

compelling state interest. Niceville, as noted, argues it needs a municipal system to obtain improved cable service and two-way interactive features, such as burglar alarms, traffic control and well metering. Warner, however, introduced substantial proof that Niceville can achieve those goals by means far less restrictive of speech than crushing the only existing private cable speaker and driving out a potential new entrant.

Nicevilie could request enhanced services from Warner, allow Cosmic or any other company that would provide such services to compete with Warner, or obtain two-way interactive burglar alarm and other services from privately-owned vendors who operate in Niceville. The City's own expert witness conceded that this was a far more feasible way to obtain interactive services than the City's elaborate proposal to build a bidirectional cable system (App. 90a-92a). Indeed, several of Niceville's council members admitted that they had not even studied the economic feasibility of, or need for, the two-way interactive services now advanced by Niceville as a major justification for a municipal system (App. 76a-78a, 95a-96a; *see also* App. 93a-95a).

In summary, the court of appeals repeatly ignored *Preferred's* command to develop a full factual record to test Warner's First Amendment allegations and the City's counter-allegations. Instead, the court decided novel and far-reaching First Amendment questions in a factual vacuum, laid down unprecedented, draconian, and erroneous legal principles, and, despite the district court's finding that unresolved material factual issues remain, found the "facts" itself. This was clear error. As *Preferred* makes clear, Warner is entitled to a trial on its First Amendment claim—a claim which implicates the public's paramount First Amendment rights to a free press.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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UNITED STATES COURT OF APPEALS

ELEVENTH CIRCUIT

Sept. 12, 1990

No. 89-3273

WARNER CABLE COMMUNICATIONS, INC.,
an Illinois corporation,

Plaintiff-Appellant,

—v.—

CITY OF NICEVILLE,

Defendant-Appellee.

Ralph A. Peterson, Beggs & Lane, Pensacola, Fla., James E. Moore, Moore, Kesler & Moore, Niceville, Fla., Grant S. Lewis, LeBoeuf, Lamb, Leiby & MacRae, New York City, for plaintiff-appellant.

Gillis E. Powell, Sr., Powell, Powell & Powell, Niceville, Fla., Don J. Caton, William D. Wells, City Attorney's Office, City of Pensacola, Pensacola, Fla., for defendant-appellee.

Appeal from the United States District Court for the Northern District of Florida.

Before

TJOFLAT, *Chief Judge*,
TUTTLE, and RONEY*, *Senior Circuit Judges.*

* *See* Rule 34-2(b). Rules of the U.S. Court of Appeals for the Eleventh Circuit.

TJOFLAT, *Chief Judge*:

Plaintiff below, Warner Cable Communications, Inc. (Warner), appeals from the district court's entry of summary judgment in favor of defendant below, the City of Niceville (City), on two of Warner's claims. Warner also appeals the judgment of the district court, entered in favor of the City after a bench trial, on a third claim. We affirm both judgments.

I.

The City of Niceville is a municipal corporation chartered, organized, and existing under the constitution and laws of the State of Florida. Warner is a corporation organized under the laws of the State of Illinois. Warner, through its predecessor corporation, began supplying cable television services to the City in 1971, pursuant to a franchise agreement with the City. The current franchise agreement between the parties was enacted by the Niceville City Council in 1980 as Ordinance 438.[1] It is a nonexclusive franchise, expiring in 1995.

Subsequent to the City's enactment of Ordinance 438, Congress passed the Cable-Communications Policy Act of 1984 (Cable Act),[2] Pub.L. 98-549, 98 Stat. 2779 (codified at 47 U.S.C. §§ 521 *et seq.* (Supp. V 1987)), which authorizes local governments to own and operate their own cable television systems, *id.* § 533(e). In 1985, after receiving numerous consumer complaints about Warner's service, the City began to explore the possibility of constructing and operating its own system. Following a favorable preliminary report from the outside firm commissioned by the city council to investigate the feasibility of such a system, a resolution concerning a City-owned cable system was submitted to the voters on

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1 The terms of the franchise that are relevant to Warner's due process claim will be set forth in the discussion of that claim, *see infra* part III.

2 In the Cable Act, Congress sought to establish a national policy for cable television systems, to encourage their growth, and to provide for uniform federal, state, and local regulation of such systems. *See* 47 U.S.C. § 521.

July 15, 1985. The resolution passed by an overwhelming majority.

Prior to the July 1985 vote, the City had granted a second nonexclusive cable franchise to a Warner competitor, Cosmic Communications, Inc. Upon learning of the City's plans to construct its own system, Cosmic determined that it could not compete as the third cable provider in Niceville. Cosmic then surrendered its franchise and successfully bid to become the City's consultant on the cable project. Cosmic conducted a second, more in-depth technical and financial feasibility study and reported that a City-owned system, charging a lower rate than Warner, could operate economically. The report contemplated that the City's system would attract more than fifty percent of Warner's Niceville subscribers.

In October 1985, the city council accepted Cosmic's report and enacted Ordinance 581, which authorized the City to issue revenue bonds for the purpose of constructing and operating a cable television system. Pursuant to state law, the City filed a bond validation petition in the Circuit Court for Okaloosa County. *See* Fla.Stat. § 75.01 *et seq.* (1989) (statutory mechanism for court approval of municipal bond financing). The court order granting the petition was appealed by Warner, which intervened in the proceeding, and was affirmed by the Florida Supreme Court. *See Warner Cable Communications v. City of Niceville*, 520 So.2d 245 (Fla.1988).

On November 5, 1985, Warner filed suit against the City, alleging that the City's conduct violated Warner's constitutional rights to freedom of speech and due process. Warner sought damages, a declaration that Ordinance 581 was unconstitutional, and injunctive relief against enforcement of the ordinance. Warner also alleged that the city's prospective editorial control over programming on the City's cable system would violate the Cable Act. When the City subsequently delegated editorial control to an independent commission, Warner amended its complaint to allege that such a delegation was barred by the Florida Constitution's prohibition against delegation of unfettered legislative authority.

After extensive discovery and submission of voluminous factual materials to the district court, both parties moved for summary judgment. The district court granted the city's motion for summary judgment on all but Warner's due process claim, holding that (1) the first amendment issue was not ripe; (2) the claim under the Cable Act was mooted by the creation of an independent editorial commission; and (3) the commission did not represent an unlawful "delegation" under the Florida Constitution or, in the alternative, the Cable Act implicitly preempted the Florida Constitution. After a bench trial, the district court denied the due process claim as well. Warner appealed, asserting as error (1) the district court's application of the wrong legal standard to the first amendment claim and its determination that the claim was not ripe; (2) the court's "misconstruction" of the due process claim; and (3) the court's conclusion that the city could, under the Florida Constitution, properly constitute an independent commission to assume editorial control.

II.

Warner challenges the constitutionality of Ordinance 581 on first amendment grounds. Warner's attack anticipates the eventual success of the City's entry into the cable business as Warner's competitor. According to Warner, the City will be able to offer lower prices to cable subscribers, which "will create a press owned and controlled by the government, and will silence the only private cable operator, thereby 'muzzl[ing] one of the very agencies the Framers of our Constitution thoughtfully and deliberately selected to improve our society and keep it free.' " (Quoting *Mills v. Alabama*, 384 U.S. 214, 219, 86 S.Ct. 1434, 1437, 16 L.Ed.2d 484 (1966)).

The district court granted summary judgment to the City after deciding that the first amendment claim was not yet ripe. The court reasoned (1) that Warner had no protected first amendment interest in retaining its full Niceville market, undiminished by competition; and (2) that Warner could assert a valid first amendment claim only if the City's action

would have the effect of totally suppressing Warner's speech by driving Warner out of business. Since the outcome of the City's competition with Warner was by no means certain, the court held that Warner had failed to demonstrate an immediate, direct injury and that the claim was therefore not justiciable. We agree with the district court with respect to (1) above but disagree with respect to (2). We conclude that Warner fails to assert a protected first amendment interest even if the projected City-owned system will surely render Warner's continued operation in Niceville economically infeasible. Accordingly, we affirm the district court's grant of summary judgment on the first amendment claim, although we rely in part of different grounds. *See Garside v. Osco Drug, Inc.*, 895 F.2d 46, 48-49 (1st Cir. 1990) (appellate court may affirm district court's grant of summary judgment on any ground that appears in record).

Warner's argument is essentially as follows. If the state or a state agent, here the City of Niceville, prevents a cable speaker from communicating its message to the public, the state or state agent "silences" the speakers.[3] Where the prevention is only partial and stems from the state's regulation of the time, place, or manner in which the speech is conducted, the first amendment is violated unless the state demonstrates that the regulation is necessary to serve an important governmental interest.[4] Ordinance 581, enacted by

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3 Warner's opposition to the City's entry into the cable market is based solely on the City's being a government actor. Because its franchise was nonexclusive, Warner could raise no breach of contract claim against the City for franchising a second private cable operator. Nor could Warner argue that the City's second franchise to a private operator was "state action" that violated Warner's first amendment rights: that argument is foreclosed by *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 106 S.Ct. 2034, 90 L.Ed.2d 480 (1986), discussed in the text *infra*, where the Supreme Court suggested that a franchising authority *could not refuse* to franchise a second operator without having at least a sound reason for doing so.

4 Warner implicitly recognizes that Ordinance 581 does not target the content of Warner's speech and that the City does not have to meet the heavy burden of demonstrating a compelling governmental reason to support its action.

the City, will have the direct and foreseeable effect of diminishing—perhaps eliminating—Warner's share of the Niceville cable audience and is not necessary to serve an important governmental interest. Therefore, the ordinance will violate Warner's first amendment rights by preventing Warner from freely communicating its message to the citizens of Niceville.

An initial question that arose in early litigation of first amendment claims by cable television companies was whether such companies merely provide conduits for electronic impulses, as do telephone companies, or are "speakers" protected by the first amendment. *See generally* Brenner, Cable Television and the Freedom of Expression, 1988 Duke L.J. 329. In *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 106 S.Ct. 2034, 90 L.Ed.2d 480 (1986), the Supreme Court resolved that question in part, recognizing that operation of a cable television system does implicate first amendment rights: at the least, a cable operator has a protected first amendment interest in its "original programming [and its] editorial discretion over which stations or programs to include in its repertoire." *Id.* at 494, 106 S.Ct. at 2037. In *Preferred*, the City of Los Angeles refused to grant a franchise to a second cable television operator in a particular area of the city, although there was sufficient physical capacity on public utility structures to carry more than one cable system. The Supreme Court remanded the case to the district court for factual exploration of the city's justification for restricting access to one cable speaker; the Court declined to express any opinion on the proper resolution of the first amendment question.

After *Preferred*, the full contours of a cable operator's first amendment right remain unshaped. Whatever those contours may be, however, we conclude that the right to be free from competition is not within them, even when the cable operator's most formidable competitor is a municipality.

Warner claims that, because the City's plan "abridges Warner's right to speak" without furthering an important governmental interest, it does not meet the standard set forth in *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20

L.Ed.2d 672 (1968) (four-part test for justifying governmental regulation that incidentally impacts upon first amendment interests). Invocation of this standard, however, only reveals the unusual nature of Warner's prevention argument. Not only does Ordinance 581 not interfere in any way with Warner's programming decisions and editorial policies, it neither regulates the conduct through which Warner communicates its message nor restricts Warner's access to its audience. Whether or not the City's cable system becomes operative, Warner will continue to have access to the Niceville cable television market unimpeded by any newly imposed restrictions as to time, place, or manner. The assertion that the City's plan "abridges Warner's *right* to speak" (emphasis added) is simply inaccurate.

What the City's ordinance does abridge is the continuation of Warner's profitable position as the only speaker in a captive cable market. A City-owned cable system, if successful, will no doubt reduce the audience for Warner's speech and diminish the profitability of that speech. Such economic loss, however, does not constitute a *first amendment injury*. "The inquiry for First Amendment purposes is not concerned with economic impact; rather, it looks only to the effect of this ordinance upon freedom of expression." *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 78, 96 S.Ct. 2440, 2456, 49 L.Ed.d 310 (1976) (Powell, J., concurring). Warner's freedom of expression remains unimpaired by the City's plan. As the district court put it, "while the first amendment protects Warner's right to make its programming decisions, its right to disseminate its speech, and its viewers' concomitant right to receive the speech, the first amendment does not guarantee that someone will listen to Warner's speech, nor pay to listen." *See also National Mkt. Reports, Inc. v. Brown*, 433 F.Supp. 1301, 1304 (S.D.W.Va. 1978) (not every governmental action affecting press implicates first amendment; statute directing insurers to publish information in competing publication may result in less enthusiastic market for plaintiff's publication but would infringe only plaintiff's profits, not its first amendment rights).

When the competing speaker is the government, that speaker is not itself protected by the first amendment, but "[t]o find that the government is without First Amendment protection is not to find that the government is prohibited from speaking." *Muir v. Alabama Educ. Television Comm'n*, 688 F.2d 1033, 1038 (5th Cir.1982) (en banc), *cert. denied*, 460 U.S. 1023, 103 S.Ct. 1274, 75 L.Ed.2d 495 (1983). "Even without First Amendment protection government may 'participate in the marketplace of ideas' and 'contribute its own views to those of other speakers.' " *Id.* (quoting *Community Serv. Broadcasting v. FCC*, 593 F.2d 1102, 1110 n. 17 (D.C.Cir. 1978)). Warner, however, raises the specter of government speech becoming so dominant as to "drown out" the voice of private speakers. This concern is misplaced in the context of the current case. We agree that the government may not speak so loudly as to make it impossible for other speakers to be heard by their audience. The government would then be preventing the speakers' access to that audience, and first amendment concerns would arise. For instance, if a city government builds a better soapbox, equipped with spotlights and powerful loudspeakers, next to the longstanding antique soapbox, in the city square, and if government speakers dominate the new soapbox, then speakers on the first soapbox do not truly have the opportunity to communicate their views even to those who might wish to hear them. The city would indeed be "drowning out" the voice of the private speakers. But if the soapboxes are equal and the city speakers simply attract more listeners because the listeners prefer the city's message, there is no "drowning out," no denial of access, and no first amendment violation. Although the government does not have a constitutionally-protected right to speak, its actions may promote the first amendment interest of making more speech available to the citizenry: the speaker on the first soapbox cannot demand to monopolize the information-seeking audience in the name of the first amendment. Like that speaker, under the City's plan, Warner retains unimpeded access to the Niceville cable

television viewers. It can decide for itself whether and what it wishes to continue to communicate to them.

Although our research has discovered no case involving a similar first amendment claim by a cable company against a would be government cable provider,[5] at least one media plaintiff has raised such a claim against government providers of information that might drive plaintiffs out of business. In *P.A.M. News Corp. v. Butz*, 514 F.2d 72 (D.C.Cir.1975), a corporation (P.A.M.) engaged in wire-service dissemination of agricultural information sought injunctive and declaratory relief against the United States Department of Agriculture (USDA). The USDA had long provided agricultural information to the public, utilizing a wire network that connected its nationwide branch offices in order to expedite the collection and dissemination of the information. In 1963, the USDA inaugurated a service whereby private parties could arrange for a "direct extension" off the USDA network and could

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5 The few cases that have dealt with this issue to date have involved situations that are factually different from the one before us. In *Consolidated Television Cable Ser. v. City of Frankfort*, for example, the Sixth Circuit held that a civil rights claim against a municipal cable provider, brought under 42 U.S.C. § 1983 (1988) and alleging *inter alia* a violation of a private cable company's first amendment rights, was barred by the doctrine of res judicata. 857 F.2d 354, 357-58 (6th Cir.1988), *cert. denied*, _____ U.S. _____, 109 S.Ct. 1537, 103 L.Ed.2d 842 (1989). Had the court reached the first amendment allegation, it would have had to consider the cable company's allegation that the municipality *denied it access* to utility poles.

In *City of Issaquah v. Teleprompter Corp.*, 93 Wash. 567, 611 P.2d 741 (1980) (en banc), the cable company challenged the municipality's proposed acquisition of the company's cable system, pursuant to a purchase-or-condemn provision in the parties' contract, in part as a violation of the company's first amendment rights. The Supreme Court of Washington rejected the cable company's argument, stating that, since the company did not dispute the city's right to deny a franchise initially without violating the company's constitutional rights.

> we have difficulty with the assertion that the city's reservation of the right to acquire the property at a later date somehow violates Teleprompter's rights. The argument in effect is that there is no right of free speech before awarding of a franchise but that, once granted, the franchisee acquires not only a franchise but a right protected by the First Amendment.

Id. at 579, 611 F.2d at 747-48.

thereby receive the news directly. P.A.M. alleged that the new direct extension service violated the corporation's first amendment rights. The court acknowledged that P.A.M.'s wire-service activity was protected by the first amendment but rejected P.A.M.'s first amendment claim, stating the "not every action which affects the press violates the first amendment." *Id.* at 277. The court explained:

> [W]e cannot endorse P.A.M.'s conclusion that the direct extension service represents an unconstitutional infringement on its first amendment rights because we conclude that the USDA's actions do not abridge any cognizable first amendment interest of appellant.
>
> . . . [T]he direct extension service does not result in a prior restraint or restriction on what appellant may publish, . . . nor does it impose any tax or penalty for the privilege of publishing. . . . What the news service represents is an increase of the public's access to information. . . . Moreover, . . . the Government's actions here further a cornerstone of the first amendment—the maximum distribution of information in the marketplace.

Id.

P.A.M. argued specifically that "it ha[d] been economically injured by [the] governmental action and ha[d] been placed at an insurmountable competitive disadvantage." *Id.* P.A.M. relied on *Grosjean v. American Press Co.*, 297 U.S. 233, 56 S.Ct. 444, 80 L.Ed. 660 (1936), in which the Supreme Court invalidated a state tax imposed on newspapers with over a certain number of copies in circulation. The *P.A.M.* court disagreed that P.A.M.'s claim fell within the rationale of *Grosjean*, explaining that the tax involved there was not bad because it took money from the pockets of the press but because it seemed to be a "deliberate and calculated device . . . to limit the circulation of information to which the public is entitled in virtue of constitutional guaranties." 514 F.2d at 278 (quoting *Grosjean* at 250, 56 S.Ct. at 449). The court concluded:

> That is not the case here. The Government is increasing, not limiting, the flow of information. The first amendment profits from this sort of governmental activity. . . . If P.A.M. performs a valuable press service through offering additional items of news and analysis, it will succeed and thrive in the marketplace. In sum, we hold that the wire extension service infringes no first amendment interest of appellant. In light of that conclusion, we need not balance the governmental interest behind the innovation against the alleged unconstitutional abridgement.

Id.

Similarly, in the case before us, we need apply no balancing test to the City's action. Because Warner retains the uninfringed right to send its messages to the Niceville audience, we hold that Warner's feared loss of profits, due to competition by the City-owned system, does not constitute a first amendment injury.

In conclusion, we note the contrast between the effect of the relief requested by Warner and the effect of the relief requested by the plaintiff cable company in *Preferred*. There, where an unfranchised company sought to enter a market dominated by one cable speaker under an exclusive franchise with the city, the city's refusal to allow more than one company access to the market imposed a direct limit on the number of speakers and thus prevented an increase in the quantity and variety of speech available to the Los Angeles cable audience. If the city could not "justify its abridgement of expressive activity." 476 U.S. at 496, 106 S.Ct. at 2038, the city's policy of granting exclusive franchises would be found invalid. The relief sought by the plaintiff cable company, if granted, would have had the effect of opening access to additional speakers, thereby *increasing* speech in the cable marketplace. The current case, however, does not involve a franchising authority's attempt to restrict speech by allowing only one cable operator access to its market. Warner would like the federal courts to prevent the City from communicating its own message to an audience that would like to receive

it, thereby *decreasing* speech in the cable marketplace. We do not believe that the first amendment requires such a result.

III.

In this appeal, Warner does not allege that the City's action constitutes a violation of Warner's constitutional right to substantive due process, *i.e.*, that the City's plan to construct and operate a competing cable system effects a "taking" of a liberty or property interest under the fifth and fourteenth amendments. Nor does Warner allege that any particular adverse decisions to date have been procedurally tainted. Rather, Warner's procedural due process claim rests on the theory that the City's conflict of interest, arising from its projected dual role as Warner's regulator and competitor, prevents it from fairly and impartially regulating a company with which it hopes eventually to compete.

Although we recognize Warner's legitimate concerns over the City's potential misuse of its position, we do not consider its due process claim ripe for adjudication at this time. For a claim to be ripe for decision in the federal courts, a plaintiff must generally show that "he has sustained or is immediately in danger of sustaining a direct injury" as a result of the allegedly unlawful conduct. *Laird v. Tatum*, 408 U.S. 1, 13, 92 S.Ct. 2318, 2325, 33 L.Ed.2d 154 (1972) (quoting *Ex Parte Levitt*, 302 U.S. 633, 634, 58 S.Ct. 1, 1, 82 L.Ed. 493 (1937)). Warner alleges neither an actual injury already sustained nor an immediately threatened injury likely to result from the City's dual—and, according to Warner, inherently partial—posture.

We note as an initial matter that Warner's argument that its franchise subjects it to "pervasive regulation" by the City trades on the implication that "regulation" by one contracting party, to which the other contracting party agrees, constitutes adjudication. We agree with Warner that due process requires "a fair trial in a fair tribunal," *Withrow v. Larkin*, 421 U.S. 35, 46, 95 S.Ct. 1456, 1464, 43 L.Ed.2d 712 (1975).

In this case, however, the franchise is a contract between Warner and the City.[6] When the parties renewed this nonex-

6 Provisions of the contract relevant to the City's regulation of Warner are as follows. The franchise sets forth generally the conditions under which Warner is given the right to use public property for the construction, operation, and maintenance of its cable television system. Warner is required to maintain insurance for personal injury and property damage and to indemnify the City for any liability arising from Warner's negligence in operating or maintaining the system. Included in section 4 of the franchise is a procedure for the receipt and resolution of consumer complaints.

Section 6 of the franchise establishes rates for the installation of equipment and for basic subscriber services. Rate increases are allowed only with the approval of the city council, following a previously noticed public hearing.

In section 7, Warner agrees to "equitably and reasonably" extend cable service to all previously unserved areas within the City within 120 days of a subscriber's request. If the subscriber is in a "remote or inaccessible location," Warner has the right to charge the subscriber for material and labor involved in extending service. The City has the right to make a final and binding determination of a location's remoteness or inaccessibility.

Section 10 requires Warner to "substantially meet the material technical requirements" of the Federal Communications Commission (FCC). Once a year, the City may engage a mutually acceptable third party to examine Warner's technical data for compliance with FCC requirements and to conduct independent testing. There are express procedures for correction or negotiation of a settlement in the event of Warner's noncompliance. After these procedures are exhausted, the City has the right to revoke the franchise. Additionally, if Warner violates any of the substantive provisions of the franchise, the City may begin forfeiture proceedings in a court of competent jurisdiction.

Section 13 requires Warner to pay an annual franchise fee equal to five percent of its gross subscriber revenue from its Niceville service. The City has the right to inspect and audit Warner's revenue records at any reasonable time.

Finally, section 15 provides that upon expiration of the franchise the City has the right to purchase, at fair market value, the physical properties and assets used under the franchise. If this provision is invoked, a three-arbitrator panel is to determine fair market value.

Many of the franchise provisions remain unaffected by the Cable Act of 1984. *See* 47 U.S.C. § 544(c) ("In the case of any franchise in effect on the effective date of this subchapter, the franchising authority may, subject to section 545 of this title, enforce requirements contained within the franchise for the provision of services, facilities, and equipment. . . ."). Other provisions, however, such as those dealing with rate increases and franchise fees, are superseded by the Cable Act. *See* text and note 7 *infra.*

clusive franchise, Warner was aware that the City itself might choose to compete in the cable market: a neighboring municipality was already providing cable service to its citizens, and Warner knew that the City had considered establishing its own system. Such nonexclusive franchise agreements between the government and private businesses contain no implied noncompetition clause. *See Madera Waterworks v. City of Madera*, 228 U.S. 454, 33 S.Ct. 571, 57 L.Ed. 915 (1913); *Skaneateles Water Works Co. v. Village of Skaneateles*, 184 U.S. 354, 362, 22 S.Ct. 400, 403, 46 L.Ed. 585 (1902). In the contract, then, Warner willingly agreed to submit to its potential competitor's sole discretion over certain matters: restoration of public property to "the reasonable satisfaction of the City" when such property is affected by construction or maintenance of the system; determination that a subscriber requesting service in a previously unserviced area was not in a "remote or inaccessible location," which meant that Warner must pay for the line extension; cost (up to $2500) of hiring a mutually acceptable consultant to collect Warner's technical data; engagement of a neutral third party to examine the technical data; city council approval of franchise assignment; and inspection of Warner's books at any reasonable time. If the City fails to exercise its contractual duty to act reasonably and in good faith with respect to the above decisions, Warner may well have a breach of contract claim against it, but, given Warner's contractual submission to the City's decision-making powers in these areas, Warner cannot cast the city's decisions as "regulation," far less "adjudication," implicating its right to due process. In the event of a third-party's (subscriber's) dispute with Warner, which the City is called upon to adjudicate, Warner might state a valid due process claim. There is, however, no such dispute before the court.

Second, it is unclear whether and to what extent the City will henceforth be called upon to act as a regulator independent of the contractual provisions between the two parties. The Cable Act limited the City's authority to regulate

Warner,[7] and to the extent that they are inconsistent, the Cable Act overrides the franchise agreement. In perhaps the most important provision for the case at hand, section 623 of the Cable Act limits a franchising authority's ability to regulate the rates charged by cable providers. That section authorizes the FCC to prescribe and enforce rules governing a franchisor's rate regulation in areas where the provider is "not subject to effective competition." *See* 47 U.S.C. § 543(b). The current FCC rule states in part:

> A cable system will be determined to be subject to effective competition whenever 100 percent of the cable community receives service from at least three unduplicated broadcast television signals. It is not necessary that the same three signals provide service to the entire community. Signals shall be counted on the basis of their predicted Grade B contour . . . or whether they are significantly viewed within the cable community . . . . A signal that is significantly viewed shall be considered to be available to 100 percent of the cable community.

47 C.F.R. § 76.33 (1989).

At trial, much energy was expended on the questions of how many broadcast television signals' Grade B contours covered the Niceville cable community and what signals were significantly viewed. Warner argued that it was not subject to effective competition and that the City could regulate its rates. The City maintained that Warner was subject to effective competition and therefore denied having any authority to regulate Warner's rates. The district court expressly declined to make factual findings on the issue. Our resolution of Warner's due process claim likewise does not require the issue to be settled: Warner has not requested the City's

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7 In addition to the provisions concerning rate regulation, discussed in the test *infra*, a number of the Cable Act's provisions limit a franchising authority's ability to regulate a cable operator. For example, the Act limits franchise fees to five percent of a cable provider's gross revenues, *see* 47 U.S.C. § 542(b), gives the FCC power to prescribe technical standards applicable to all cable systems, *see id.* § 544(e), and establishes specific procedures for modification, renewal, and sale of cable franchises, *see id.* §§ 545-547.

approval for any increase or decrease in its rates, nor has it expressed any desire to adjust its rates unilaterally. "The central concern [of the ripeness doctrine] is whether the case involves uncertain and contingent future events that may not occur at all." 13A C. Wright, A. Miller, & E. Cooper, Federal Practice & Procedure § 3532.1, at 112 (2d ed. 1984). The proper time to decide the effective competition issue is when a concrete dispute over rate regulation takes shape. In the present case, there is no such dispute to adjudicate.

Similarly, even in the permissible area of regulation clearly not covered by the franchise, Warner might make no requests of the City. If, when Warner wants to raise or, more probably, to lower its rates, the Niceville area is covered by three unduplicated broadcast signals, no request for a rate change will be necessary. And if Warner does make a request to perform some activity that requires City approval, the City may simply grant it—the record indicates at least that city council members are aware of the need to "maintain a level playing field" on which Warner and the City can compete. In short, given our rejection of Warner's first amendment claim, there is no live controversy, actual or immediately threatened, between the parties at this time.

We emphasize, in conclusion, that we do not foreclose the possibility that the City's dual role as Warner's regulator and competitor might, in particular circumstances, give rise to a valid due process claim. If a dispute arises in which the City is called upon to be " 'complainant, jury, judge and "executioner," ' " *Cruz v. Ferre*, 755 F.2d 1415, 1422 (11th Cir.1985) (quoting *Cruz v. Ferre*, 571 F.Supp. 125, 133 (S.D.Fla.1983)), there may exist an intolerably high risk of self-interested, unfair governmental action, particularly since the City's competitor in this case is a first amendment speaker. We recognized in *Cruz* that, because of the "potentially great impact upon first amendment rights[,] . . . regulation of a communicative activity must adhere to more narrowly drawn procedures than regulation of ordinary commercial activity." *Id.* Currently, however, Warner has brought no matter before the City for decision, and the City is threatening no regulatory action that will result in redress-

able injury to Warner. In the absence of any such controversy involving actual or threatened injury to Warner, our consideration of its procedural due process claim would be premature.

IV.

The district court advanced alternative grounds for holding that Ordinance 609, establishing an independent editorial programming board pursuant to the Cable Act, *see* 47 U.S.C. § 533(e)(2), did not offend the Florida Constitution's prohibition against the delegation of unrestricted legislative authority. The court held that Ordinance 609 delegated only the authority necessary for an administrative agency to carry out a legislative plan. The court also held that, to the extent that the two conflicted, the Cable Act, which forbids government owner-franchisors to exercise editorial control, preempted the state constitutional provision, so that the creation of an independent commission was not a delegation of any authority possessed by the City. We affirm, noting that both grounds of decision are intertwined.

Warner's unlawful delegation argument stems from article 2, section 3, of the Florida Constitution, which provides that "[t]he powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein." First, we agree with the district court that, under Florida law, creation of the editorial board does not constitute the sort of delegation of unrestrained legislative authority contemplated by article 2, section 3. Interpreting that section, the Florida Supreme Court has held that while a legislative body

> may not delegate the power to enact a law; or to declare what the law shall be, or to exercise an unrestricted discretion in applying a law[,[. . . it may enact a law complete in itself, designed to accomplish a general public purpose, and may expressly authorize designated offi-

> cials within definite valid limitations to provide rules and regulations for the complete operation and enforcement of the law within its expressed general purpose.

Florida State Bd. of Architecture v. Wasserman, 377 So.2d 653, 655 (Fla.1979) (quoting *Bailey v. Van Pelt*, 78 Fla. 337, 82 So. 789, 793 (1919)). The Florida court has also recognized that "the specifity of standards and guidelines may depend upon the subject matter dealt with and the degree of difficulty involved in articulating finite standards." *Askew v. Cross Key Waterways*, 372 So.2d 913, 918 (Fla.1979).

Examination of Ordinance 609 reveals that it contains sufficient standards and guidelines to satisfy the requirements of article 2, section 3. The ordinance requires the editorial commission to select at least "thirty-seven (37) basic channels, which shall include government, educational and local access channels, and not less than five premium channels" and provides that "selection of these channels shall be made by the Commission in a manner consistent with the revenue and expense projections involved with the financing of the system." The ordinance empowers the commission to

> establish its own operating rules and regulations to govern its programming decisions and other decisions necessarily incidental thereto. The rules and regulations promulgated by the Commission shall provide for receiving input from the residents of the City of Niceville and they shall further provide for the holding of appropriate hearings prior to making any final determinations regarding program selection.
>
> . . . .
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> The Commission shall conduct such public hearings deemed helpful to gather information from the residents and citizens in performing its function. The Commission may make or cause to be made any necessary special studies on the location, condition, and adequacy of available programs and the desirability of any matters to be so transmitted.

Given the nature of the subject matter and the difficulty of articulating more finite standards while complying with the Cable Act's prohibition against editorial control by owner-franchisors, *see* 47 U.S.C. § 533(e)(2), the directives of the ordinance meet the flexible test of specifity articulated in *Askew*. We hold therefore that there was no delegation of unfettered legislative authority that would violate the Florida Constitution.

Second, even if there were an attempt to make an unlawful delegation here, the unlawful delegation doctrine applies only when a legislative body delegates authority that it in fact possesses. *See City of Miami Beach v. Fleetwood Hotel, Inc.*, 261 So.2d 801, 803 (Fla.1972). As noted above, with certain exceptions not relevant here, the Cable Act preempted the ability of state and local governmental entities to exercise editorial or programming control over the content of any cable system in which the governmental entity has an ownership interest. *See* 47 U.S.C. § 533(e)(2). Because federal law prohibits a government owner-franchisor from exercising editorial control, the City could not delegate to the editorial board power that the City did not have. Thus, we hold that, in creating such a board, the City has complied with the federal statute and has not offended the Florida Constitution.

V.

For the foregoing reasons, the judgments of the district court are

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

Case No. 85-4414-RV

WARNER CABLE COMMUNICATIONS, INC.,

Plaintiff,

—v.—

CITY OF NICEVILLE, FLORIDA,

Defendant.

ORDER AND MEMORANDUM OPINION

The plaintiff and defendant are parties to a cable television franchise in effect from 1980 through 1995. The plaintiff filed this action on November 7, 1985, seeking declaratory and injunctive relief and damages for alleged injuries arising from the enactment of Ordinance 583 by the defendant City. In adopting this ordinance, the City implemented its decision to compete with the plaintiff in the Niceville cable television market with a city-owned cable system. The plaintiff sought relief for alleged violations of its first amendment and fourteenth amendment rights, of the Cable Communications Policy Act of 1984, and of Florida law. All claims except the due process claim were dismissed in an order entered herein on April 11, 1988. (Doc. 180) The case proceeded to trial before the Court without a jury on May 16, 1988. The parties have fully briefed the issues involved. Upon consideration of all the evidence and in accordance with Rule 52, Federal Rules of Civil Procedure, I make the following findings of fact and conclusions of law.

I. *FINDINGS OF FACT*

Plaintiff Warner Cable Communications, Inc. ("Warner"), a wholly-owned subsidiary of Warner Communications, Inc., is a corporation organized under the laws of the State of Illinois. Warner provides cable television services in Niceville, Florida, under, a franchise agreement with the defendant. Defendant City of Niceville ("the City") is a municipal corporation chartered, organized and existing under the Constitution and laws of the State of Florida.

Warner began providing cable services within the City of Niceville in December 1971, pursuant to a franchise agreement with the City. Warner's Niceville service area includes the City of Niceville itself and some adjoining unincorporated portions of Okaloosa County, Florida, extending east of Niceville to and including the Blue Water Bay development. In its Niceville area system, Warner has between 6,000 and 6,500 customers, 3,554 of whom are located within the city limits of the City.

The current franchise agreement between Warner and the City was enacted as Ordinance No. 438, on February 12, 1980. It is a nonexclusive franchise extending until 1995. Under the franchise, Warner pays to the City a franchise fee of five percent of its annual gross subscriber revenues.

The franchise generally sets out the conditions under which the plaintiff is given the right to use public property for the construction, operation, and maintenance of a cable TV system. The franchise requires Warner to maintain insurance for personal injury and property damage and to indemnify the City for all its liability which may arise through the negligence of the plaintiff in the operation and maintenance of the system. Included in the franchise is a procedure for the receipt and resolution of consumer complaints.

Section (6) of the franchise provides for the rates to be charged for installation of equipment and for basic subscriber service. Increases in the basic rates must be authorized and approved by the City Council. Prior to October 30, 1984, the effective date of the Cable Communications Policy Act of 1984 [47 U.S.C. §§ 521 *et seq.*], Warner had sought and

received approval of the City of Niceville for basic rate increases, and Warner had never been denied a requested rate increase.[1] Rates for non-basic services may be set by Warner under the franchise in accordance with applicable Federal Communications Commission ("FCC") regulations.

Section (7) of the franchise requires Warner to "equitably and reasonably" extend service to all areas within the city limits within 120 days of a subscriber request. The plaintiff may charge the subscriber for material and labor if the subscriber is in a "remote or inaccessible location." The City Council has the authority to decide what locations are remote and inaccessible. Each time this issue has been raised regarding extensions to new subscribers, the Council has determined that the sites were not remote and inaccessible. Therefore, Warner had to bear the expense of extension for trunk cables.

Section (8) of the franchise makes it subject to all applicable FCC rules and regulations. Also, this provision provides that the law of Florida governs the franchise.

Section (10) requires Warner to meet the material technical requirements of the FCC for cable services. Once a year, the City may authorize a third-party review of Warner's compliance with these technical standards. After receipt of the report, the franchise provides express procedures for negotiating a settlement or correction if Warner is in fact not in compliance with the FCC standards. Once all the procedures have been exhausted, the City is given the right to revoke the

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1 In the Cable Communications Policy Act, Congress authorized the Federal Communications Commission to promulgate rules concerning rate regulation of cable systems by franchising authorities. 47 U.S.C. § 543(b); *see infra* note 3. However, the Act permitted continued rate regulation for basic services as provided in existing franchise agreements for the two years following the effective date of the Act. 47 U.S.C. § 543(c). The Act also allowed cable operators to increase any rate subject to regulation under the Act by five percent per year if the rates so charged would not be precluded by an existing franchise agreement. Following the effective date of the Act, Warner unilaterally imposed 5% rate increases in 1985 and 1986 without the approval of the City Council.

franchise if Warner has not corrected the problem or made reasonable attempts at correction.

Furthermore, if Warner violates any of the substantive provisions of the franchise, then the City has the right to institute forfeiture proceedings. Forfeiture may be declared only by a court of competent jurisdiction after a hearing. If the problems with the system arise from unforeseen events or events beyond the control of Warner, then the revocation and forfeiture proceedings may be forestalled.

Section (11) gives Warner the right to surrender the franchise by filing a written notice with the City Clerk 18 months before the surrender date. Assignment of the franchise can occur only on written approval of the City Council. Section (15) provides a procedure for the City's purchase of the physical properties and assets of Warner at the expiration of the franchise. In the alternative, the City has the right to renew the franchise or to negotiate a new franchise with Warner or another cable company. Section (19) declares: "This franchise shall be non-exclusive."

Subsequent to the enactment of Ordinance 438, the contractual relationship between Warner and the City was significantly altered by the Cable Communications Policy Act of 1984, Pub. L. 98-549, 98 Stat. 2780 (codified at 47 U.S.C. §§ 521 *et seq.*).[2] In this Act, Congress sought to establish a national policy for CATV systems, to encourage the growth of cable TV, and to provide uniform guidelines for federal, state, and local regulation of cable services. 47 U.S.C. § 521. Specifically, the Act placed limitations on the authority of governments to regulate rates. *See* 47 U.S.C. §§ 542-543. The Act grants power to the FCC to establish technical standards, and franchising authorities may only regulate such services in a manner consistent with the Act.[3] 47 U.S.C. § 544. The Act

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2 In 1987, the Florida Legislature enacted minimum standards and procedures for the grant of cable television franchises. Ch. 87-62, Laws of Fla. (1987) (codified at Section 166.046, Fla. Stat.).

3 Pursuant to Section 624(e) of the Cable Communications Policy Act [47 U.S.C. § 544(e)], the FCC has adopted technical standards governing the

also provides for procedures on modification [47 U.S.C. § 545], renewal [47 U.S.C. § 546], and sale [47 U.S.C. § 547] of cable franchises. To the extent applicable, these federal guidelines pre-empt the terms of Ordinance 438.

In Section 623(a) of the Act, Congress provided that the states may not regulate rates for cable services except to the extent provided in that section. 47 U.S.C. § 543(a). In Section 623(b), Congress authorized the FCC to prescribe and enforce regulations concerning the regulation of rates for cable services in locations where the cable system is "not subject to effective competition." 47 U.S.C. § 543(b). Congress placed a two-year moratorium on the application of the FCC rules to existing franchise agreements. *Id.* Thus, as of October 30, 1986, the franchise agreement between the City and Warner became subject to the FCC rules.

The FCC adopted the existing rules in its Report and Order of April 11, 1985 (MM Docket No. 84-1296). 50 Fed. Reg. 18637 (1985); *see* 47 C.F.R. § 76.33 (1987). In these rules, the FCC defined "effective competition" as:

> A cable system will be determined to have effective competition whenever at least three unduplicated signals serve the cable community. Signals shall be counted if they place a Grade B contour (as defined in § 73.683 of our rules) over any portion of the cable community, are significantly viewed within the cable community (as defined in § 76.54 of our rules) or are translator stations licensed to serve the cable community, provided that the translators are not used to retransmit stations already providing Grade B contour or significantly viewed signals within the cable community.
>
> 47 C.F.R. § 76.33(a)(2) (1987).

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quality of cable TV signals. *See* 47 C.F.R. §§ 76.601, 76.605 (1987). The regulations preclude local authorities from imposing more stringent standards. 47 C.F.R. 76.605 note 1. The Supreme Court recently upheld pre-emption of state technical standards by the FCC and ruled that the FCC had acted within its authority in promulgating these rules. *City of New York v. Federal Communications Commission*, 486 U.S. _____, 108 S.Ct. _____, 100 L.Ed.2d 48 (1988).

This standard was invalidated by the District of Columbia Circuit Court of Appeals in *American Civil Liberties Union v. Federal Communications Commission*, 823 F.2d 1554, 1571-73 (D.C. Cir. 1987), *cert. denied*, ____ U.S. ____, 108 S.Ct. 1220, 99 L.Ed.2d 421 (1988).

Prior to the trial in this case, the FCC adopted a new "signal availability standard" to comply with the *American Civil Liberties Union v. Federal Communications Commission* decision. *Second Report and Order* (MM Docket No. 84-1296, adopted March 24, 1988). The new rule states in part:

> A cable system will be determined to be subject to effective competition whenever 100 percent of the cable community receives service from at least three unduplicated broadcast television signals. It is not necessary that the same three signals provide service to the entire community. Signals shall be counted on the basis of their predicted Grade B contour (as defined in § 73.683 of the rules) or whether they are significantly viewed within the cable community, as defined in Section 76.54(b) and (c) of the rules. A signal that is significantly viewed shall be considered to be available to 100 percent of the cable community.
>
> *Second Report and Order, supra*, at 31.

The revised standard became effective on October 29, 1988. Both the old and new rules provide that any party may petition the FCC for relief from the standards. 47 C.F.R. § 76.33(e) (1987).

Much evidence was presented at the trial in this case concerning the number of television broadcast signals whose Grade B contours cover the Niceville cable community. The plaintiff claimed that it was not subject to effective competition, and therefore, the City had the authority to regulate its rates. The City argued that Warner was subject to effective competition, and therefore, it had no authority to regulate Warner's rates. City Councilman Gary Brown testified that, according to the information provided to him by the City's attorneys and its cable consultant, the City could not control

the rates of Warner. Whether Warner is subject to rate regulation by the City would not affect my decision in this case. Accordingly, I make no factual finding on the issue whether Warner is subject to effective competition within the meaning of the Act and the FCC rules.

The Cable Communications Policy Act also authorizes local government ownership of cable TV systems. 47 U.S.C. § 533(e). In 1985, the City Council appointed a committee to study the possibility of operating its, own cable system. After receiving a favorable commmittee report, the City Council commissioned a feasibility study, which also resulted in a favorable report. A resolution was placed on the July 16, 1985, ballot concerning the issue of a city-owned cable system, and the resolution passed by a large majority.

The City hired a consultant to perform technical and financial feasibility study. The study found that the City could economically operate a system in competition with its franchisee at rates lower than those charged by Warner. The consultant's report was accepted by the City Council on October 8, 1985.

On October 16, 1985, the City Council enacted Ordinance 583, which provided for the issuance of revenue bonds not exceeding $2 million for the purpose of constructing and operating a cable TV system. Warner filed this suit on November 7, 1985.

The bond validation petition was filed in the Circuit Court for Okaloosa County, Florida, and the court entered an order granting the petition on August 5, 1987. The plaintiff intervened in this proceeding and appealed the judgment of the court. The Supreme Court of Florida affirmed the decision prior to the trial of this action. *Warner Cable Communications v. City of Niceville*, 520 So.2d 245 (Fla. 1988).

II. *CONCLUSIONS OF LAW*

This Court has jurisdiction in this matter and over these parties, pursuant to Title 28, *United States Code*, Sections 1331, 1343, and 2201.

The plaintiff claims that the defendant's enactment of Ordinance 583 deprives it of property without due process of law in violation of the fourteenth amendment because the City has become both the plaintiff's regulator and competitor. Specifically, the plaintiff argues that the City Council cannot sit as an impartial tribunal for making decisions concerning the franchise because the City is itself a direct CATV competitor of the plaintiff. The plaintiff argues that the City has an irreconcilable conflict of interest which renders it incapable of fairly regulating with "due process" as required by the Constitution. No particular adverse decision has been presented to show a deprivation of property interests. In essence, the plaintiff's claim is that a per se violation of the fourteenth amendment due process clause occurs when a governmental authority enters into direct competition with its regulated cable TV franchisee.

The fourteenth amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law." *U.S. Const.*, 14th amend. Generally, to show a violation of due process, the plaintiff must demonstrate (1) a life, liberty, or property interest (2) of which it has been deprived by state action (3) without sufficient due process protections. *See Daniels v. Williams*, 474 U.S. 327, 331-32, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986); *Parratt v. Taylor*, 451 U.S. 527, 536-37, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981); *Economic Development Corp. v. Stierheim*, 782 F.2d 952, 953-54 (11th Cir. 1986).

The plaintiff's argument focuses on the third element of this claim . . . sufficient due process involving a state-imposed deprivation of property. The plaintiff assumes that the decisions of the City Council in relation to the franchise will inevitably deprive it of constitutionally-protected property interests. Therefore, the decisionmaking process itself cannot function to provide the requisite due process.

Conceptually, the plaintiff's *per se* due process claim is founded on the structural conflict of interest inherent in the two distinct roles the City will play in regulating a business competitor. What procedures are required for due process are not invariable; due process is flexible and requires the proce-

dural protections commensurate with a certain situation. *Little v. Streater*, 452 U.S. 1, 5-6, 101 S.Ct. 2202, 68 L.Ed.2d 627 (1981); *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1976). In order to determine what process is due, a court must consider: (1) the private interests at stake; (2) the risk that the procedures used will lead to an erroneous deprivation and the probable value of the suggested procedural safeguards; and (3) the governmental interest affected. *Little v. Streater*, *supra*, 452 U.S. at 13; *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 78 (1976). The basic requirements of due process are notice and an opportunity to be heard. *E.g.*, *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 13, 98 S.Ct. 1554, 56 L.Ed.2d 30 (1978). An impartial tribunal is not always required. *See, e.g., Holley v. Seminole County School District*, 755 F.2d 1492, 1497-98 (11th Cir. 1985). Furthermore, for some deprivations of property, there may be adequate state remedies to redress the damage, so that providing more or better procedural process would not be necessary under the Constitution. *See Parratt v. Taylor*, *supra*, 451 U.S. at 521.

It is true, of course, that in certain instances an impartial decisionmaker is required under the due process clause. *See, e.g., In re Murchison*, 349 U.S. ,133, 75 S.Ct. 623, 99 L.Ed. 942 (1955); *Withrow v. Larkin*, 421 U.S. 35, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975); *Gibson v. Berryhill*, 411 U.S. 564, 93 S.Ct. 1684, 36 L.Ed.2d 488 (1973). In some cases, the risk of intolerable unfairness is so great that the procedure provided constitutes a per se violation of the constitution. *See Withrow v. Larkin*, *supra*, 421 U.S. at 58. However, in such cases, it is clear that the intolerable risk includes adjudication of a specific, identifiable property interest. *See Gibson v Berryhill*, *supra*, 411 U.S. at 564 (delicensing procedure for optometrists); *United Church of the Medical Center v. Medical Center Comm'n*, 689 F.2d 693 (7th Cir. 1982) (adjudication of right to real property); *Cruz v. Ferre*, 755 F.2d 1415 (11th Cir. 1985) (regulation of "indecent material" shown over cable TV). Thus, before I can determine whether the impartial tribunal requirement is triggered, I must identify the

property interests which are threatened by the enactment of Ordinance 583.

In order to have a property interest in a benefit, a person must have a legitimate claim of entitlement to the benefit, not just an abstract need or desire for it, which arises from sources other than the Constitution, ordinarily state law. *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). "The hallmark of property . . . is an individual entitlement grounded in state law, which cannot be removed except 'for cause'." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982).

The plaintiff has advanced various interests which it claims are property interests protected under the constitution.[4] First, the franchise itself constitutes a benefit in which the plaintiff has a protected property interest under state law. *See Leonard v. Baylen Street Wharf Co.*, 59 Fla. 547, 52 So. 718 (1910); *North Dade Water Co. v. Florida State Turnpike Authority*, 114 So.2d 458, 460 (3d DCA 1959), *cert. denied*, 120 So.2d 620, and *appeal dismissed*, 120 So.2d 621 (Fla. 1960); *see also Bell v. Burson*, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971). However, it is undisputed that the franchise has not been revoked, nor are revocation proceedings threatened by the City. The plaintiff's authority to provide cable TV service to the residents of the City of Niceville has not been challenged or threatened. Therefore, there has been no deprivation of property that would support a claim under the fourteenth amendment with respect to the plain-

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4 Warner has also claimed that the City as regulator and competitor will infringe its first amendment liberty interest in its cable communication. *See City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 106 S.Ct. 2034, 90 L.Ed.2d 480 (1986); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 502, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981); *Reed v. Village of Shorewood*, 704 F.2d 943, 949 (7th Cir. 1983). This argument was raised in Count I of the plaintiff's complaint, on which I granted the defendant's motion for summary judgment. (Doc. 180) I found that the enactment of Ordinance 583 did not infringe nor threaten to infringe on the constitutionally-protected speech rights of the plaintiff. That is the law of this case.

tiff's property interest in the franchise. *See Wells Fargo Armored Service Corp. v. Georgia Public Service Comm'n*, 547 F.2d 938 (5th Cir. 1977).

The only threatened (and likely) injury to the plaintiff's franchise is damage which arises from competition with the proposed City cable system. Economic injury resulting from mere lawful competition does not implicate the plaintiff's property interest in the franchise. *See Tennessee Electric Power Co. v. Tennessee Valley Authority*, 306 U.S. 118, 59 S.Ct. 366, 83 L.Ed. 543 (1939); *Skaneateles Water Works Co. v. Skaneateles*, 184 U.S. 354, 22 S.Ct. 400, 46 L.Ed. 585 (1902); *Green v. Ivey*, 45 Fla. 338, 33 So. 711 (1903); *Boyd v. Bonded Garages, Inc.*, 160 So.2d 724 (3d DCA), *cert. denied*, 166 So.2d 593 (Fla. 1964).

The Supreme Court of the United States has held that the fourteenth amendment does not preclude a city from operating a business in competition with private business and regulating the private business through its lawful powers. *See City of Pittsburgh v. Alco Parking Co.*, 417 U.S. 369, 94 S.Ct. 2291, 41 L.Ed.2d 132 (1974); *Puget Sound Power & Light Co. v. Seattle*, 291 U.S. 619, 54 S.Ct. 542, 78 L.Ed. 1025 (1934). Where a private business has a nonexclusive franchise, damage resulting from lawful competition by the state is *damum absque injuria*, and will not support a claim for depriving the private business of property without due process of law. *Tennessee Electric Power Co. v. Tennessee Valley Authority*, *supra*, 306 U.S. at 118; *Alabama Power Co. v. Ickes*, 302 U.S. 464, 58 S.Ct. 300, 82 L.Ed. 374 (1938).

If the City's decision to compete with its franchisee involved a "conspiracy or fraud or malice or coercion" to drive the plaintiff out of business, then the general rule allowing competition would not apply. *See Alabama Power Co. v. Ickes*, *supra*, 302 U.S. at 478. Also, unreasonably burdensome regulation, in combination with competition by the regulator, may amount to a taking of property without just compensation in violation of the fifth and fourteenth amendments. *See City of Pittsburgh v. Alco Parking Co.*, *supra*, 417 U.S. at 379 (Powell, J., concurring). However, the mere

fact that the City competes and regulates is not sufficient to show deprivation of a protected interest.

The defendant here has the authority to own a cable system. *See* 47 U.S.C. 533(e); *Warner Cable Communications v. City of Niceville*, 520 So.2d 245 (Fla. 1988). The franchise ordinance is expressly "nonexclusive" and contains no provision precluding competition by the City. Furthermore, the Supreme Court has determined that franchise agreements between the state and private businesses contain no implied noncompetition clause. *See Madera Water Works v. Madera*, 228 U.S. 454, 33 S.Ct. 571, 57 L.Ed. 915 (1913); *Skaneateles Water Works Co. v. Skaneateles*, *supra*, 184 U.S. at 354. Thus, the City may compete with the plaintiff during the course of the franchise without implicating the fourteenth amendment.

The plaintiff has pointed to no evidence of fraud, collusion, malice, or conspiracy in the City's decision to compete with Warner in the cable TV business. The City is admittedly attempting to provide cable TV service at a lower cost than the plaintiff. Whether the City will be able to do this, or to even compete effectively with the plaintiff, is mere speculation at this point.

The risk of competition was present at the time Warner entered into the franchise agreement. While the franchise itself is constitutionally-protected property, it does not confer a contractual or property right to be free from lawful competition by another private business or by the franchising authority.[5] *See Tennessee Electric Power Co. v. Tennessee*

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5 Under Florida law, a governmental franchisee can sue to enjoin unlawful competition. *See Tampa Electric Co. v. Withlacoochee River Electric Coop.*, 122 So.2d 471 (Fla. 1960); *St. Joseph Telephone & Telegraph Co. v. Southeastern Telephone Co.*, 149 Fla. 14, 5 So.2d 55 (1941); *cf. Frost v. Corporation Commission*, 278 U.S. 515, 49 S.Ct. 235, 73 L.Ed. 483 (1929). Florida law thus protects against economic injury to a governmental franchisee from competition with a competitor not lawfully franchised or otherwise acting outside the law. Warner, therefore, has a legitimate claim of entitlement to be free from economic injury through unlawful competition.

Valley Authority, *supra*, 306 U.S. at 139; *Rio Grande Valley Gas Co. v. City of McAllen*, 152 F.2d 591 (5th Cir. 1945). Thus, the threatened competitive injury to the plaintiff's interest in the franchise does not implicate the fourteenth amendment.

The plaintiff also claims that it has a property interest in the use and enjoyment of its franchise, including the right to pursue its business and make a return on its investment. These interests, like the interest in the franchise itself, are protected under the fourteenth amendment. *See*, *e.g.*, *Terrace v. Thompson*, 263 U.S. 197, 215, 44 S.Ct. 15, 68 L.Ed. 255 (1923); *Buchanan v. Warley*, 245 U.S. 60, 74-75, 38 S.Ct. 16, 62 I,.Ed. 149 (1917). Possession of the franchise would, of course, be useless without the opportunity to "do business" and earn a fair return. However, there is nothing in the record to demonstrate the present or threatened impairment of these rights by the City. In the cases cited by the plaintiff, state action had actually precluded the claimant from some particular use of its property. *See Henkels v. Sutherland*, 271 U.S. 298, 46 S.Ct. 524, 70 L.Ed. 953 (1925) (interest income on proceeds of property wrongfully seized and sold by the government); *Terrace v. Thompson*, *supra*, 263 U.S. at 197 (statute precluding lease of land to aliens); *Buchanan v. Warley*, *supra*, 245 U.S. at 60 (statute regulating occupancy of property by race).

In this case, the use and enjoyment of the franchise is threatened only by competition from the franchisor. The fourteenth amendment does not protect against loss of

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This issue has not been addressed directly by the parties, although several aspects of the case have been related to it. For example, in the summary judgment order of April 11, 1988, I found that operation of a cable TV system was a municipal purpose under Florida law. (doc. 180) *See also Warner Cable Communications v. City of Niceville*, 520 So.2d 245 (Fla. 1988). I also found that the defendant had not violated the unlawful delegation doctrine under Florida's Constitution. (doc. 180) In the petition for bond validation proceedings, the state court found that Ordinance 583 had been adopted and enacted in accordance with the city charter and laws of the state. *City of Niceville v. State*, Case No. 86-2427-C (Cir. Ct. Okaloosa Cty. August 5, 1987), *aff'd*, 520 So.2d 245 (Fla. 1988).

patronage due to competition. *See Public Service Comm'n v. Great Northern Utilities Co.*, 289 U.S. 130, 53 S.Ct. 546, 77 L.Ed. 1080 (1933). As with the franchise itself, the effect of competition on these property interests does not provide a deprivation within the meaning of the fourteenth amendment.

The plaintiff also claims that various property rights incident to the franchise will be infringed by the City's action. For example, the plaintiff claims a property right in contracting for services with customers as necessary and proper incident to carrying on its business. If Ordinance 583 imposed some burden or obstruction on the ability of the plaintiff to make contracts with citizens of Niceville for cable TV services, then the fourteenth amendment may be implicated. However, that is not the situation in this case. Ordinance 583 does not impair the ability of the plaintiff to contract for services. Clearly, whether the plaintiff will contract with individuals for cable TV may be affected by competition from the City. However, the franchise contains no entitlement to a specific citizen's business, nor to any certain number of subscribers. It only authorizes Warner to freely contract with willing citizens for cable TV. The plaintiff holds the same rights in this regard as it did prior to the enactment of Ordinance 583. Thus, its interest in contracting with citizens as an incident to its business has not been impaired.

The plaintiff also claims a property interest in not bearing the expense of extension of service lines to remote or inaccessible locations and in assignment of its franchise to a third party. In these instances, the plaintiff simply has no constitutionally-protected property interest. The franchise gives the City the discretion to decide what is a remote or inaccessible area and whether the plaintiff may assign the franchise.

In summary, I find that the plaintiff has suffered no actual or threatened deprivation of property within the meaning of the fourteenth amendment. The fact that the defendant has become both its competitor and regulator does not, without more, implicate due process. Therefore, the plaintiff's claim must fail.

Accordingly, the Clerk shall enter a judgment in favor of the defendant and against the plaintiff on Count III of the complaint, with taxable court costs.

DONE AND ORDERED this 10th day of March, 1989.

/s/ ROGER VINSON
Roger Vinson
United States District Judge

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

PCA 85-4414-RV

WARNER CABLE COMMUNICATIONS, INC.,

Plaintiff,

—v.—

CITY OF NICEVILLE, FLORIDA, *et al.*,

Defendants.

ORDER

The plaintiff holds a franchise agreement from the defendant municipality to provide cable television service. The defendant is in the process of constructing and operating its own cable TV system in competition with the plaintiff. In this suit, the plaintiff seeks to enjoin the establishment of the city-owned system. The plaintiff alleges that the bond validation ordinance for the city system is unconstitutional because, *inter alia*, it violates the plaintiff's first amendment and due process rights. Pending are cross motions for summary judgment. This order addresses the various issues raised in the motions.

I. Background.

Plaintiff Warner Cable Communications, Inc. ("Warner"), a wholly-owned subsidiary of Warner Communications, Inc., is a corporation organized under the laws of the State of Illinois. Warner provides cable television services in Niceville, Florida, under a franchise agreement with the defendant City

of Niceville ("the City"). Defendant City of Niceville is a municipal corporation chartered, organized, and existing under the Florida Constitution and laws of the State of Florida.

Warner began providing cable services to the City through its predecessor corporation in December 1971. The current franchise agreement between Warner and the City was enacted as Ordinance No. 528, on February 12, 1980. It is a nonexclusive franchise and extends until 1995. Under the franchise, Warner pays to the City a five percent franchise fee based upon gross subscriber revenues per year. Warner agreed to "equitably and reasonably" extend trunk cable to all areas within the city limits, with the City Council making the final determination concerning remoteness or inaccessibility. The City also has the authority to regulate rates and service.

Warner's Niceville service area includes the City of Niceville and some surrounding unincorporated portions of Okaloosa County, Florida. In this area, Warner has between 6,000 and 6,500 customers, 3,554 of whom are located within the city limits. Warner also has three other cable TV systems within the West Florida area. Since 1984, Warner has been operating in competition with another private system at the Sandestin Resort. Although Warner has lost 70% of its customers in that system, it has continued its Sandestin operations.

In the Spring of 1979, during the last year of Warner's first fifteen-year franchise agreement with the City, the City considered alternatives to the renewal of Warner's franchise. These alternatives included: (a) utilizing the cable system owned and operated by its neighboring municipality, Valparaiso, Florida, and (b) constructing its own cable TV system. The City went so far as to commission a feasibility study for a municipally-owned system.

The City remained undecided through the expiration of Warner's franchise. Warner then filed suit to force the City to either renew the franchise or buy its system. That litigation was terminated when the City decided to renew Warner's franchise in 1980.

Following the renewal, the City Council members began receiving consumer complaints concerning the cable service. These complaints involved Warner's programming, the company's nonresponsiveness to customer complaints, poor reception and technical service, and the fee schedule.

In March 1984, the City Council conducted a survey of citizens regarding an alternate cable system. Most of those who responded indicated that they would favor an alternative cable TV system. In October 1984, the City granted a franchise for competing cable TV services to Cosmic Communications, Inc., by enacting Ordinance No. 552. Cosmic surrendered this franchise less than a year later without having become operational.

At the beginning of 1985, the City Council learned that the Cable Communications Policy Act of 1984 [47 *U.S.C.* §§ 521 et seq.] authorized local government ownership of cable TV systems. 47 *U.S.C.* § 533(e). The City Council appointed a committee to study the possibility of operating its own system. In the Spring of 1985, the City received a recommendation from the committee that the matter be pursued further.

The City then commissioned a feasibility study by a private firm. After receiving what it deemed to be a favorable report, the City Council passed Resolution 85-20, which placed the issue of a City-owned cable system on the municipal election ballot for July 16, 1985. Warner vigorously opposed the resolution through a public advertising campaign. The resolution, however, was approved.

Following the referendum, the City took further steps toward implementing its own cable TV system. It commissioned Cosmic as a consultant for an in-depth technical and financial feasibility study. It also authorized the preliminary steps of a bond issue to finance the municipally owned system.

The Cosmic feasibility report was accepted by the City Council on October 8, 1985. On October 16, 1985, the City Council enacted, on third reading, Ordinance No. 583, which provided for the issuance of revenue bonds not exceeding $2 million for the purpose of constructing and operating a cable TV system. On December 9, 1986, the City Council

voted to adopt, on third reading, Ordinance No. 609, which established an independent programming board for the purpose of controlling the editorial content of the City system. On August 26, 1987, the City filed a bond validation petition in the Circuit Court for Okaloosa County, Florida.

Warner filed this suit on November 7, 1985. Warner alleges various constitutional and statutory claims arising from the City's decision to construct its own cable TV system. Warner also intervened in the bond validation hearing; a separate suit involving different claims, but the same parties, is being litigated in state court.

II. Discussion.

The defendant has filed a motion for summary judgment on all six counts of the complaint. (Doc. 105) The plaintiff has filed a motion for partial summary judgment on Count IV of the complaint. (Doc. 118) After reviewing the materials submitted and the arguments of the parties on the legal issues, I rule as follows on each count of the complaint.

(A) *First Amendment.* Warner has alleged in Count I of its complaint and has sought to show factually that the entry of the City into the Niceville cable TV market will drive Warner out of business. Warner contends that the Cable TV market in Niceville is a natural monopoly and that the City plans to take advantage of its favorable revenue-raising powers and tax-free status to provide expanded service to the citizens of Niceville at a lower cost. Warner claims that it will be unable to compete with the City on these terms and that its "voice" will be inevitably suppressed in violation of the first amendment.

The Supreme Court of the United States addressed the first amendment interests of cable TV operators in *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. ____, 106 S.Ct. ____, 90 L.Ed.2d 480 (1986). In that case, the city refused to grant a franchise to the cable company, and the city utility department refused to allow the company access to its poles or underground conduits for the purpose of setting

up a cable system. The district court dismissed the cable company's first amendment claim, the Ninth Circuit reversed, and the Supreme Court affirmed that the complaint stated a claim under the first amendment. The Court specifically held that the cable operator had a protected first amendment interest in its "original programming or by exercising editorial discretion over which stations or programs to include in its repertoire." 90 L.Ed.2d at 487. The Court, however, did not articulate what standard of review was appropriate for violations of cablespeech rights, nor did it indicate the degree to which the first amendment protects the rights of cablespeakers.

The standards of review actually applied to cable TV indicate that CATV systems have been treated as hybrids of the print and broadcast media. For example, when a regulation directly infringes on a cable operator's programming decisions, courts have generally invalidated the regulations as content-based restrictions for which there was no compelling government interest. *See, e.g., Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434 (D.C. Cir. 1985) (invalidating FCC must-carry rules), *cert. denied*, ____ U.S. ____, 106 S.Ct. 2889, 90 L.Ed.2d 977 (1986); *Midwest Video Corp. v. FCC*, 571 F.2d 1025, 1053-57 (8th Cir. 1978) (indicating FCC mandatory access rules violated first amendment rights of cable operators), *aff'd* 440 U.S. 689, 99 S.Ct. 1435, 59 L.Ed.2d 692 (1979). On the other hand, governmental restrictions on the ability of a cable operator to "speak," such as the denial of a franchise agreement, are usually upheld as content-neutral and. necessary to further important government interests. *See, e.g., Central Telecommunications, Inc. v. TCI Cablevision, Inc.*, 800 F.2d 711 (8th Cir. 1986); *Omega Satellite Products Co. v. City of Indianapolis*, 694 F.2d 119 (7th Cir. 1982); *Community Communications Co. v. City of Boulder*, 660 F.2d 1370 (10th Cir. 1981), *cert. denied*, 456 U.S. 1001, 102 S.Ct. 2287, 73 L.Ed.2d 1296 (1982).

These cases have generally been resolved by the standards enunciated for review of more traditional first amendment claims. When a government regulation directly curtails expression or indirectly burdens speech by favoring one view-

point over others, the government bears a heavy burden to sustain the regulation by showing the restriction is "necessary to advance a significant and legitimate state interest." *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984); *see Quincy Cable TV, Inc. v. FCC*, *supra*, 768 F.2d at 1450-51. However, when the regulation is content neutral, it is valid if it "furthers an important or substantial government interest . . . and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *United States v. O'Brien*, 319 U.S. 367, 377, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968); *see Arcara v. Cloud Books, Inc.*, 478 U.S. ____, 106 S.Ct. ____, 92 L.Ed.2d 568 (1986).

The recitation of these standards demonstrates the unusual nature of Warner's suppression argument. Ordinance 583 does not infringe on the programming decisions of Warner. The plaintiff has the unfettered discretion to exercise editorial control over its content and programming. Ordinance 583 also does not restrict the ability of Warner to communicate its message. The plaintiff still has access to the Niceville cable TV market. Thus, unlike the plaintiff cable companies in the cases cited above, Warner is not burdened with programming regulation nor has it been denied access to cable TV viewers.

It is not clear that Ordinance 583 implicates the first amendment interests of Warner in any way. Ordinance 583 is not on its face content-based. It neither directly curtails Warner's protected first amendment interests, nor does it indirectly burden speech by favoring the viewpoint of the City over Warner's. *See, e.g., Muir v. Alabama Educational Television Comm'n*, 688 F.2d 1033, 1038 (5th Cir. 1982) (although not protected by first amendment, government may speak), *cert. denied*, 460 U.S. 1023, 103 S.Ct. 1274, 75 L.Ed.2d 495 (1983). Apparently recognizing that Ordinance 583 places only an incidental burden on speech, the plaintiff argues that the ordinance furthers no legitimate government purpose and the restriction on speech is greater than necessary.

The problem with this argument is that Ordinance 583 does not clearly place any restriction on Warner's protected speech interests. There is no restriction on the time, place, or manner in which Warner may exercise its programming decisions or communicate its message. The gravamen of the claim is that the ordinance will reduce the quantity and profitability of Warner's speech. However, "[t]he injury for First Amendment purposes is not concerned with economic impact; rather, it looks only to the effect of this ordinance upon freedom of expression." *Young v. American Mini Theatres*, 427 U.S. 50, 78, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976) (Powell, J., concurring). Thus, while the first amendment protects Warner's right to make its programming decisions, its right to disseminate its speech, and its viewers' concomitant right to receive the speech, the first amendment does not guarantee that someone will listen to Warner's speech, nor pay to listen.

Thus, in order for Ordinance 583 to restrict the protected speech interests of Warner, it must have the effect of totally suppressing Warner's speech, as the plaintiff has argued. However, while the scenario depicted by Warner is certainly a possible result of the City's venture into the Niceville cable TV market, it is by no means the only result. As discussed below, the natural monopoly rationale simply does not support Warner's position, and there are a variety of factors that will influence the outcome of this competition that cannot be determined at this point. Therefore, Warner's claim that Ordinance 583 will effect an unconstitutional suppression of its speech does not present a justiciable claim or controversy for decision.

Warner is relying upon the alleged natural monopoly characteristics of the cable TV industry to show an injury to its first amendment rights. Other cases have considered this characteristic of the cable industry in another posture. For example, the franchising authority has argued that the natural monopoly produced by cable TV justified governmental regulation of the number of cable franchises. *See Omega Satellite Products Co. v. City of Indianapolis*, *supra*, 694 F.2d at 119; *Community Communications Co. v. City of Boulder*,

supra, 660 F.2d at 1370. In such circumstances, the natural monopoly characteristics of the cable TV industry is a factor in determining whether the franchising authority was justified in choosing one cablespeaker over others. These cases do not suggest, however, that the first amendment is implicated when one of two cablespeakers is unable to communicate its message because of the economic conditions of the relevant community.

It also may be true that only Warner or the City would survive a competitive market. However, it is by no means certain that Warner must inevitably lose. Numerous events must occur before that result can be reached. First, the City's system must become operational. The City may not finalize the financing; it may never become operational for technical problems. Assuming that the City system does become operational, it may suffer from the same consumer problems that have plagued Warner. The citizens of Niceville may prefer Warner's system after all.

Furthermore, the outcome of a competition between Warner and the City will depend on what actions Warner takes in the future. Presumably, as the record indicates it has done in similar situations, Warner will attempt to compete with the City system. What effect this will have on the market is simply not capable of determination at this point. Even if there was evidence establishing that only one system can survive in Niceville, it cannot be said now that Warner will inevitably lose.

The allegations of the plaintiff concerning the effect of Ordinance 583 raise a substantial question whether Count I presents a justiciable claim. A federal court only has the power to adjudicate actual cases and controversies. *U.S. Const.* art. III, § 2, cl. 1. While it may be possible to envision a series of events which would result in some concrete injury to protected interests, in order to present a justiciable claim, a plaintiff must generally show that "he has sustained or is immediately in danger of sustaining a direct injury" as a result of the allegedly unlawful conduct. *Laird v. Tatum*, 408 U.S. 1, 13, 92 S.Ct. 2318, 33 L.Ed.2d 154 (1972); *see also Roe v. Wade*, 410 U.S. 113, 127-28, 93 S.Ct. 705, 35

L.Ed.2d 147 1973); *Metzenbaum v. Federal Energy Regulatory Comm'n*, 675 F.2d 1282, 1287 (D.C. Cir. 1982).

A claim based on conduct that only presents a potential for unconstitutional application is considered not yet ripe and deprives a court of subject matter jurisdiction. Ripeness doctrine implicates both Article III and prudential, discretionary policy reasons for declining jurisdiction. "The central concern is whether the case involves uncertain and contingent future events that may not occur as anticipated, or indeed may not occur at all." 13A C. Wright, A. Miller, & E. Cooper, *Federal Practice & Procedure* § 3532, at 122 (2d ed. 1984).

Just because a person has a protected interest that may be injured if certain events occur does not mean that a federal court may adjudicate the claim within the bounds of Article III. *See United Public Workers v. Mitchell*, 330 U.S. 75, 89-91, 67 S.Ct. 556, 91 L.Ed. 754 (1947); *Zemel v. Rusk*, 381 U.S. 1, 85 S.Ct. 1271, 14 L.Ed.2d 179 (1965). For a claim to be ripe, it must present an immediate and direct injury, and delay in resolution must adversely affect the interests of all parties. *See Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 81-82, 98 S.Ct. 2620, 57 L.Ed.2d 595 (1978).

In deciding whether a claim is ripe, courts consider a number of factors reflecting Article III and prudential concerns. Injuries which are simply too remote or uncertain generally do not present ripe controversies. *See, e.g., Johnson v. Sikes*, 730 F.2d 644 (11th Cir. 1984). Where the effect of the law remains speculative, the case is also not considered ripe. *See, e.g., Metzenbaum v. Federal Energy Regulatory Comm'n, supra*, 675 F.2d at 1282. A lack of ripeness is also indicated where the course of future events is contingent on actions in the control of the parties themselves. *See, e.g., United Public Workers v. Mitchell, supra*, 330 U.S. at 75; *Zemel v. Rusk, supra*, 381 U.S. at 18-20.

In the context of the first amendment, ripeness concerns are considerably relaxed to avoid the chilling effect of an unconstitutional ordinance. *See, e.g., International Society for Krishna Consciousness v. Eaves*, 601 F.2d 809, 817-26

(5th Cir. 1979). This is especially true when there is only one person against whom a regulation affecting protected first amendment interests can be applied. *See, e.g., Entertainment Concepts, Inc. v. Maciejewski*, 631 F.2d 497, 500 (7th Cir. 1980), *cert. denied*, 450 U.S. 919, 101 S.Ct. 1366, 67 L.Ed.2d 346 (1981). And when lack of resolution will present a real hardship to the parties, there is more reason to find the case ripe. *See, e.g., Duke Power Co. v. Carolina Environmental Study Group, Inc., supra*, 438 U.S. at 81-82.

All these factors are brought into play by the suppression argument advanced by Warner. The plaintiff has asserted a first amendment injury; however, Ordinance 583 does not directly regulate those aspects of Warner's operations in which it has a protected first amendment interest. Unlike cases in which the plaintiff appears likely to engage in protected, yet prohibited, first amendment activity, in this case the plaintiff is engaging in the protected activity and the regulation does not prohibit it from continuing. Suppression of Warner's first amendment interests will occur, if at all, through the economic injury it may (or may not) suffer.

It is also true that the plaintiff is the only person whose cablespeech will be affected by the entry of the City into the cable market. However, the nature of the cable industry seems to insure that there will generally be only one competitor when another cable system enters a market. Warner may be able to prove a first amendment violation if it can show that its "voice" was targeted for suppression by the City.

I also recognize that there can be severe hardship to the parties in not deciding whether suppression of Warner's voice through Ordinance 583 would violate the first amendment. The City may build its system at great expense, and Warner may suffer economic loss before the claim becomes ripe. However, the speculative nature of the claim outweighs this factor.

Accordingly, I find that any claim based on the effect of Ordinance 583 as totally suppressing Warner's speech is simply not ripe for adjudication. The defendants' motion for summary judgment on that aspect of Warner's first amend-

ment claim is hereby GRANTED, and the plaintiff's first amendment claim is DISMISSED, without prejudice.

(B) *Overbreadth*. Count II of the complaint challenges Ordinance 583 on overbreadth grounds because it allegedly impairs the protected speech interests of cable TV operators not before the court. A statute may be challenged as facially unconstitutional when any attempt to enforce the legislation would create an unacceptable risk of suppression of protected first amendment activity. A facially unconstitutional statute can never be applied validly. *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 796-98, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984).

An overbreadth challenge may be brought when statutes have such "a deterrent effect on free expression that they should be subject to challenge even by a party whose own conduct may be unprotected." *Id.* at 798 (footnote omitted). Thus, although the party before the court could have the statute applied to him if narrowly construed, a court can allow the overbreadth challenge to prevent the chilling effect of the statute on others not before the court. *Id.* at 798-801. When the statute regulates conduct and speech, the overbreadth must be substantial in relation to the valid applications of the statute. *Id.* at 799-800; *see Broadrick v. Oklahoma*, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973).

After a thorough analysis of the issue presented in Count II, however, it is apparent that it is not necessary to determine whether Ordinance 583 is unconstitutional on overbreadth grounds. On its face, Ordinance 583 regulates speech, if at all, because of its alleged effect on the economic feasibility of competing with the City's cable TV system. Thus, the ordinance would have the same deterrent effect for speech of parties not before the Court as it would on Warner. The plaintiff has identified no protected speech interests different from its own that would be chilled by the ordinance. Therefore, an overbreadth challenge is inappropriate. *See City Council of Los Angeles v. Taxpayers for Vincent*, *supra*, 466 U.S. at 802.

Accordingly, the defendant's motion for summary judgment on Count II of the complaint is hereby GRANTED, and this claim is DISMISSED, without prejudice.

(C) *Due Process.* In Count III of the complaint, Warner claims that the City will deprive it of due process of law in violation of the fourteenth amendment because the City has become both its competitor and regulator. The plaintiff points out that under the franchise agreement, the City has the power to make final decisions concerning Warner's rates and service. The plaintiff argues that since the City is also Warner's competitor, the City has a pecuniary interest in decisions concerning its franchise, so that the City Council cannot sit as an impartial tribunal. *See In re Muchison*, 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955); *Withrow v. Larkin*, 421 U.S. 35, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975); *Gibson v. Berryhill*, 411 U.S. 564, 93 S.Ct. 1684, 36 L.Ed.2d 488 (1973). In response, the City argues that no due process claim exists where a governmental entity both regulates and competes with its franchisee. *See, e.g., City of Pittsburgh v. Alco Parking Co.*, 417 U.S. 369, 94 S.Ct. 2291, 41 L.Ed.2d 132 (1974); *Puget Sound Power & Light Co. v. Seattle*, 291 U.S. 619, 54 S.Ct. 542, 78 L.Ed. 1025 (1934); *Skaneateles Water Works Co. v. Skaneateles*, 184 U.S. 354, 22 S.Ct. 400, 46 L.Ed. 585 (1902).

This claim contains a fundamental problem. The constitutional right of a certain procedure under the due process clause does not exist in a vacuum. It depends on the presence of a specific liberty or property interest. *See Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). And, due process is a variable concept, which requires that the procedure accord with the interests that are threatened. *See Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985). Specifically, an independent adjudicatory body is not always required to satisfy due process. *See, e.g., Holley v. Seminole County School District*, 755 F.2d 1492, 1497-98 (11th Cir. 1985).

Accordingly, in order for the plaintiff to substantiate its claim in Count III, it must also point to a property interest that will be threatened at a hearing before the City Council, and it must show that in this context it is entitled to an independent adjudicator. The record indicates that Warner is likely to seek rate adjustments and modifications concerning service areas under the franchise agreement, and that the City Council does possess some pecuniary interest in these decisions. Neither party has attempted to address the factual issues which would resolve this claim. Genuine issues of material fact remain. Therefore, the motion for summary judgment on Count III is hereby DENIED.

(D) *Cable Communications Act.* Under Count IV of the complaint, the plaintiff seeks to enjoin enforcement of the revenue bond ordinance because it allows the city to violate Title 47, *United States Code*, Section 533(e). Under Section 533(e)(1), a franchising authority is empowered to hold "any ownership interest in any cable system." However, the franchising authority is forbidden from exercising editorial control over the content of any cable service in which it owns an interest. 47 *U.S.C.* § 533(e)(2). Such editorial control must be exercised through an entity separate from the franchising authority. *Id.*

At the time Warner filed this suit in November of 1985, the City had not established an independent editorial board for its proposed cable system. The bond ordinance was enacted on October 16, 1985. During the next year, the City Council discussed what networks should be carried as part of the proposed system. The City, through its cable TV consultant and City Manager, negotiated and signed affiliate agreements with several commercial networks. On December 9, 1986, the City Council passed Ordinance 609, which established a programming board for the City's cable TV system. By making decisions concerning what commercial networks would have access to the City's system and how the proposed channel array would be used, the City has arguably made editorial decisions affecting the "speech" of the City's cable TV system.

However, it is not necessary to determine whether the City has violated 533(e), because I find that Count IV of the complaint is now moot. An action that is moot does not present a justiciable case or controversy under Article III of the Constitution. *See Kremens v. Bartley*, 431 U.S. 119, 127-28, 97 S.Ct. 1709, 52 L.Ed.2d 184 (1977); *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 239-40, 57 S.Ct. 461, 81 L.Ed. 617 (1937). The enactment of a statute which remedies the principle attacked in an action moots that claim. *See, e.g., Kremens v. Bartley, supra*, 431 U.S. at 128-29; *Church of Scientology Flag Service Org. v. City of Clearwater*, 777 F.2d 598, 604-06 (11th Cir. 1985), *cert. denied*, ____ U.S. ____, 106 S.Ct. 1973, 90 L.Ed.2d 656 (1986); *Johnson v. State*, 586 F.2d 387 (5th Cir. 1979).

Ordinance 609 establishes a programming control board separate from the franchising authority. The plaintiff has not attacked the method by which the City established this board. The ordinance thus satisfies the aspect of Count IV which challenged the deficiency in Ordinance 583 of not setting up an independent editorial control board. For that reason, Count IV is moot.

Even if I assume that some injury occurred by the fact. that the City made editorial decisions prior to the enactment of Ordinance 609, it does not appear that Warner has standing to complain of that specific injury. In order to have standing, the plaintiff must allege a personal stake in the outcome of the case. *See, e.g., Sierra Club v. Morton*, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972); *Warth v. Seldin*, 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). Article III establishes three minimum requirements for a plaintiff to have standing. First, the plaintiff must show that "he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982). Second, he must show that the injury is fairly traceable to the challenged action. *Id.* And, finally, he must show that the injury is likely to be redressed by a favorable decision. *Id.*; *see also Simon v. Eastern Kentucky Wel-*

fare Rights Org., 426 U.S. 26, 96 S.Ct. 1917, 48 L.Ed.2d 450 (1976).

Several prudential considerations have been recognized in determining whether a plaintiff has standing to bring an action. *See Valley Forge Christian College*, *supra*, 454 U.S. at 474-75. One of these is that the plaintiff's complaint fall within the "zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Id.*; *see also Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970).

Warner has alleged no specific injury to itself in Count IV, and it does not appear to have suffered any injury as a result of this action of the City. The legislative purpose of Section 533(e) is "to preclude undue government control of programming contrary to the First Amendment." H. Rep. No. 98-934, 98th Cong., 2d Sess. 58, reprinted in 1984 U.S. Code Cong. & Ad. News 4655, 4695. The interests Congress sought to protect by enacting Section 533(e) were those speech interests protected by the first amendment which would be violated if a governmental entity exercised editorial control over the speech of a cable franchise.

Although in Count I Warner asserted that its first amendment rights would be injured by competition from the City's cable TV system, it has not indicated how its right to speak will be affected or has been injured by the alleged editorial decisions of the City. Warner's editorial control over its own speech has not been limited or regulated by the editorial decisions of the City Council.

The persons who may have been injured by the City's actions are those whose right to receive information over the City's cable system has been limited by the editorial discretion of the City, and those whose right to speak over the City's cable system has been limited by the restrictions on access engendered by the City's decisions. Warner, however, has not identified any injury it suffered as a result of this conduct of the City, and I cannot find that it would benefit from a declaration that the actions of the City complained of in Count IV were unlawful.

Accordingly, the defendant's motion for summary judgment on Count IV is hereby GRANTED, and the claim is DISMISSED, without prejudice.

The plaintiff also claims in Count IV and in its motion for partial summary judgment that the City Council cannot lawfully establish an editorial programming board, and, therefore, cannot own an interest in a cable TV system. Section 533(e) requires that the City yield all control over programming for a municipally-owned cable system to a separate, independent entity in order to comply with the restrictions of the first amendment. Plaintiff argues that establishing such an independent agency for editorial control is impossible under the Florida Constitution.

The source of plaintiff's argument is the unlawful delegation doctrine embodied in Article II, Section 3, of the Constitution of the State of Florida:

> The powers of state government shall be divided into legislative, executive, and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.

This section has been interpreted to preclude an elected governing body from delegating its legislative authority to an agency or person without defining "the limits of the power by including in the enactment reasonable standards which enable the affected public to meet the requirements of the enactment. These standards at the same time preclude the exercise of arbitrary power by the enforcement agencies of the government." *Smith v. Portante*, 212 So.2d 298, 299 (Fla. 1968) (quoting *Barrow v. Holland*, 125 So.2d 749, 752 (Fla. 1960)); *see In re Advisory Opinion to the Governor*, 509 So.2d 292, 311-12 (Fla. 1987); *Askew v. Cross Key Waterways*, 372 So.2d 913 (Fla. 1978). The unlawful delegation doctrine applies to municipalities which delegate their authority to city agencies. *See, e.g., City of Miami Beach v. Fleetwood Hotel, Inc.*, 261 So.2d 801 (Fla. 1972).

Warner argues that the City cannot provide guidelines to the editorial programming board established by Ordinance

609 sufficient to comply with the Florida Constitution and at the same time remain in compliance with the federal constitution and statute. Thus, according to the plaintiff, the Florida Constitution dictates a result in direct conflict with the United States Constitution and a law enacted thereunder. I find that the plaintiff's argument must fail.

First, to the extent the Florida Constitution requires a result in direct conflict with the United States Constitution and a valid federal law, the supremacy clause controls. *E.g.*, *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 406, 4 L.Ed. 579 (1819); *Hamm v. City of Rock Hill*, 379 U.S. 306, 311-12, 85 S.Ct. 384, 13 L.Ed.2d 300 (1964); *Reynolds v. Sims*, 377 U.S. 533, 584, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964). "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Art. VI, cl. 2, U.S. Const.

Second, Ordinance 609 does not appear to me to violate the unlawful delegation doctrine of the Florida Constitution. That doctrine is invoked when a legislative body delegates its own legislative authority. *See, e.g., Askew v. Cross Key Waterways, supra*, 372 So.2d at 913; *City of Miami Beach v. Fleetwood Hotel, Inc., supra*, 261 So.2d at 801. It is apparent from Section 533(e) that the City does not have the authority to control the programming for its own cable system. It cannot delegate power which it does not have. Section 533(e), however, does require the City to establish an independent programming board. By enacting Ordinance 609, the City has complied with the federal statute, and it has not violated the Florida Constitution.

Finally, while a legislative body under Article II, Section 3, of the Florida Constitution "may not delegate the power to enact a law, or to declare what the law shall be, or to exercise an unrestricted discretion in applying a law[,] . . . it may enact a law complete in itself, designed to accomplish a general public purpose, and may expressly authorize designated officials within definite valid limitations to provide rules and regulations for the complete operation and enforce-

ment of the law within its expressed general purpose." *Florida State Board of Architecture v. Wasserman*, 377 So.2d 653, 655 (Fla. 1979). The authority of administrative officials to make such rules and regulations is not among the powers implicated by Article II, Section 3. Such incidental administrative authority is necessary for the agency to carry out the legislative plan. *Id.*

By Ordinance 583, the City recognized that ownership of a cable TV system was a municipal purpose of the City of Niceville, and it embarked on a program to operate such a system. As it cannot operate such a system without an independent programming board, Ordinance 609 makes it possible for the City to carry out the expressed public purpose of Ordinance 583. The authority exercised by the members of the board is incidental to the legislative decision to operate a cable TV system. Thus, even if the delegation doctrine is applicable in this context, Ordinance 609 does not violate it.

Accordingly, the plaintiff's cross motion for partial summary judgment on Count IV is hereby DENIED.

(E) *Municipal purpose.* In Count V of its complaint, the plaintiff asserts that operation of a cable TV system is not a "municipal purpose" and, therefore, Ordinance 583 is unauthorized under Florida's Constitution and law. Article VIII, Section 2(b), of the Florida Constitution grants municipalities the authority to exercise their "governmental, corporate, and proprietary" powers for "municipal purposes." Art. VIII, § 2(b), *Fla. Const.*; *see also* § 166.021(a), *Fla. Stat.* (1987).

I need not address the various arguments presented by the parties on this point, for the City could not grant a franchise for a CATV system unless it could provide that service itself as a municipal purpose. *Miami Beach Airline Service, Inc. v. Crandon*, 159 Fla. 504, 32 So.2d 153 (1947); *State ex rel. Buford v. Pinellas County Power Co.*, 87 Fla. 243, 100 So. 504 (1924); *Southern Utilities Co. v. Palatka*, 86 Fla. 583, 99 So. 236 (1924), *aff'd* 268 U.S. 232, 455 S.Ct. 488, 69 L.Ed. 930 (1925); *St. Joe Natural Gas Co. v. City of Ward Ridge*, 265 So.2d 714 (1st DCA 1972), *cert. denied*, 272 So.2d 816 (Fla. 1973). It naturally follows that plaintiff's argument is

not well founded. Accordingly, defendants' motion for summary judgment on Count V is GRANTED and this claim is DISMISSED.

(F) *Count VI.* Count VI of the complaint does not state a cause of action. It is hereby DISMISSED.

(G) *Legislative immunity.* In its motion for summary judgment, the defendant claims that the individual defendants as City Council members are entitled to legislative immunity. After this motion was filed, the plaintiff and defendants entered into a stipulation to dismiss all the individual defendants, which I granted. (Docs. 170,173) Accordingly, the defendants' motion for summary judgment concerning the immunity of the individual defendants is DENIED as moot.

DONE AND ORDERED this 11th day of April, 1988.

/s/ ROGER VINSON
United States District Judge

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

Filed November 16, 1990

No. 89-3273

WARNER CABLE COMMUNICATIONS, INC.,
an Illinois corporation,

Plaintiff-Appellant,

—versus—

CITY OF NICEVILLE,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC

(Opinion September 12, 1990, 11th Cir.,
19__, ____ F.2d ____).

Before:

TJOFLAT, *Chief Judge*,
TUTTLE, and RONEY*, *Senior Circuit Judges*.

PER CURIAM:

(✓) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) are Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ GERALD BARD TJOFLAT
United States Circuit Judge

* *See* Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

ORDINANCE NO. 438

AN ORDINANCE GRANTING A FRANCHISE TO WARNER CABLE CORP., A CORPORATION, ITS SUCCESSORS, AND ASSIGNS, TO BUILD, CONSTRUCT, ERECT, OPERATE AND MAINTAIN A CABLE TELEVISION SYSTEM AND ASSOCIATED TRANSMISSION AND DISTRIBUTION FACILITIES THEREOF, IN, OVER, ALONG, ACROSS AND UPON THE STREETS, LANES, AVENUES, ALLEYS, BRIDGES, HIGHWAYS AND OTHER PUBLIC PLACES IN THE CITY OF NICEVILLE, FLORIDA, AND SETTING FORTH THE TERMS AND CONDITIONS ACCOMPANYING THE GRANTING OF THIS FRANCHISE; AND PROVIDING AN EFFECTIVE DATE.

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF NICEVILLE, FLORIDA, That

SECTION 1

This Ordinance shall be known and may be cited as the Cable Television Franchise Ordinance of 1979. The City of Niceville shall hereafter be referred to as the "City" and Warner Cable Corp. shall hereafter be referred to as "Grantee".

SECTION 2

Subject to the terms and conditions hereinafter set forth the City hereby grants to the Grantee a private franchise with the right and privilege to construct, erect, use, operate and maintain, in, upon, along, across, over or under the streets, alleys easements, public ways and public places now established, laid out, or dedicated and all extensions thereof and additions thereto, in the City, poles, wires, cables, underground conduits, manholes and other conductors and fixtures necessary for the installation, maintenance and operation of a

cable television system for the transmitting of television signals and other signals either separately or upon or in conjunction with any public utility maintaining the same in the City with all of the necessary and desirable appliances and appurtenances pertaining thereto. Without limiting the generality of the foregoing, this franchise and grant shall and does hereby include the right in, over, under and upon the streets, sidewalks, alleys, easements and public grounds and places in the City to install, erect, operate, use or in any way acquire the use of as by leasing or licensing, poles, all lines, and equipment necessary to a cable television system and the right to make connections to subscribers and the right to repair, replace, enlarge and extend said lines, equipment and connections. Nothing herein shall be construed or constructed as in any way limiting or confining the operation of the cable television system contemplated hereby from being expanded by the Grantee as to provide cable television service to adjacent unincorporated areas of the county or to adjacent or contiguous municipalities or communities. In the event that additional poles need be erected, they will be erected in such manner and at such places as approved and specified by the City.

SECTION 3

(A) The City shall, in no way, be liable or responsible for any accident or damages that may occur in the construction, operation or maintenance by the Grantee of its facilities hereunder, and the Grantee does agree hereby to indemnify the City and hold it harmless against any and all liability, loss, cost, damage or expense, which may occur to the City by reason of the neglect or default of the Grantee in the construction, operation or maintenance of its facilities hereunder. The Grantee shall be solely responsible for determining widths of right of way on City streets and alleys. For the purpose of complying with the above, the Grantee shall carry property damage and public liability insurance in some responsible

insurance company or companies qualified to do business in the State of Florida, in the following amounts:

(1) Property damage, $50,000.00 as to one accident.

(2) Liability due to injury or death of person—$300,000.00 as to any one person and $500,000.00 as to any one accident. In each of these policies the City shall be named as an insured and a copy of each policy or a certificate of insurance shall be delivered to an retained by the City. The Grantee shall show evidence of advance payment on the aforesaid insurance policies and failure to do so may constitute a breach of the Grantee's duties hereunder.

(B) The City shall notify the Grantee within thirty (30) days after the presentation of any claim or demand, either by suit or otherwise, made against the City on account of any negligence as aforesaid on the part of the Grantee.

SECTION 4

The Grantee shall maintain a business officer within the City for the purpose of receiving inquiries or complaints from its customers. Grantee's business office shall be sufficiently and adequately staffed and maintained in a manner so as to meet the needs of its customers, either in person or by telephone, in a reasonably prompt and efficient manner. The Grantee shall in good faith attempt to investigate all reasonable complaints within 24 hours of their receipt and shall in good faith attempt to resolve them within 48 hours of receipt, and agents of Grantee will be available in the City for these purposes. Records of all customer complaints regarding Grantee's services, including their resolution or disposition, shall be maintained by Grantee for a period of twelve (12) months and shall be furnished to the City monthly. The following City official shall be responsible for receiving and acting upon any unresolved subscriber complaints and shall have primary responsibility for the continuing implementation of the complaint procedures and administration thereof: *The City Manager of the City of*

Niceville or his designee. Notice of the procedures for reporting and resolving complaints will be given by Grantee to each new subscriber at the time of initial regular subscription to the cable system. Annually upon reasonable notice to the Grantee, the City Council may agenda for discussion and appearance by the Grantee for purpose of briefing the City Council on the system's status of operation and future plans and to discuss any complaints with may have been registered with the City Council.

SECTION 5

(A) All structures, lines and equipment erected by the Grantee within the City shall be so located as to cause minimum interference with the proper use of streets, alleys, easements and other public ways and places and to cause minimum interference with the rights or reasonable convenience of property owners, and the Grantee shall comply with all reasonable, proper and lawful ordinances of the City in this regard now or hereafter in force and not in conflict herewith. Construction and maintenance of the transmission distribution system, including housing connections, shall be in accordance with the provisions of the National Electrical Safety Code prepared by the National Bureau of Standards, the National Electrical Safety Code and the National Board of Fire Underwriters as are in existence on the effective date of this ordinance and such applicable and reasonable ordinances and regulations of the City of Niceville, Florida, affecting electrical installations not in conflict herewith which may be presently in effect or may be enacted by the City Council of the City of Niceville, Florida. Existing poles, posts and other such structures of the electrical power system of the City or of any telephone company or other public utility shall be made available to the Grantee for leasing or licensing at reasonable terms and shall be used to the extent practicable in order to minimize interference with travel or the public convenience. The City shall assist the Grantee to

the extent practicable in obtaining joint pole use agreements from the owners of existing poles.

(B) In case of any disturbance of pavement, sidewalk, driveway, other surfacing or other public property the Grantee shall, at its own cost and expense and in a manner approved by the City, promptly replace and restore all paving, sidewalk, driveway or surface so disturbed in as good condition as before said work was commenced to the reasonable satisfaction of the City. It is further provided that if such repairs are not promptly made by the Grantee the City, at its option and after reasonable notice to Grantee, may make such repairs as it may deem necessary for which it shall be reimbursed by Grantee.

(C) In the event that at any time during the period of this franchise the City shall lawfully elect to alter or change any street, alley, easement or other public way requiring the relocation of the facilities of the Grantee, then in such event the Grantee, upon reasonable notice by the City, shall remove, relay and relocate the same at its own expense; provided, however, where public funds other than the City's are available for such relocation pursuant to law, then in that event the Grantee shall not be required to pay the cost.

(D) The Grantee shall on the request of any person holding a building moving permit issued by the City, temporarily raise or lower its lines to permit the moving of the buildings. The expense of such temporary removal shall be paid by the person requesting the same, and the Grantee shall have the authority to require such payment in advance.

(E) The Grantee shall have reasonable authority to trim trees upon and overhanging all streets, alleys, easements, sidewalks and public places of the City so as to prevent the branches of such trees from coming into contact with the facilities of the Grantee.

(F) All poles, lines, structures and other facilities of the Grantee in, on, over and under the streets, sidewalks, alleys easements and public grounds or places of the City shall be

kept by the Grantee at all times in a safe and substantial condition.

SECTION 6

The rates for installation of equipment and for basic subscriber services shall be as set forth below:

(A) *Residential Subscribers*

Initial Installation (through outside wall only)	*$20.00*
Monthly Service charge (first outlet)	*7.50*
Installation of each additional outlet	*7.50*
Monthly Service each additional outlet	*1.50*
Reconnect Fee (if service suspended)	*7.50*
Reactivate Existing Drop	*7.50*
Relocate outlet	*7.50*
House Move	*Cost plus 10%*

An additional charge may be added to the applicable rates when a subscriber elects to subscribe to "pay" TV or other optional services in addition to the basic service, when offered and available.

Provided, however, nothing contained herein shall operate or be construed to prohibit or prevent the Grantee, at its sole option, from lowering the above stated rates from time to time for special promotions, for specified periods of time, during the term hereof.

(B) *Commercial Subscribers*

To be negotiated on an individual basis.

An additional charge may be added to the applicable rates when a subscriber elects to subscribe to "pay" TV services in addition to the basic service, when offered and available.

(C) *Public Buildings*

The Grantee shall provide at no charge installation and service to public buildings within the City, to include the police station, fire station, city hall, and city library.

(D) No increase in rates charged for installation of equipment for basic subscriber services, and for basic monthly subscriber services, as specified in the preceding paragraphs shall be made effective except as authorized and approved by the City Council within forty-five (45) days after formal notice to the City of such increase by Grantee and after a full, open and public proceeding upon prior notice affording due process and opportunity of all interested parties to be heard, except that in the event that the City Council fails to approve or disapprove the rate increase within the 45-day period, such increase shall be effective at the end of the 45-day notice period. Provided, however, nothing herein shall prohibit the City from enacting by Ordinance a utility tax to be paid by each subscriber to the Grantee's cable television system within the City limits, should state law permit the same during the term hereof.

(E) Rates for services other than installation of equipment for basic service and for regular subscriber services shall be established by the Grantee pursuant to any applicable rules of the Federal Communications Commission.

(F) In the event that service to a subscriber is interrupted for reasons within Grantee's reasonable control for a continuous period of 24 hours or longer, the monthly cable rate shall be prorated for such subscribers for such period that the service is terminated.

SECTION 7

The Grantee shall equitably and reasonably extend energized trunk cable to all areas within the limits of the City within 120 days of a request by a subscriber, not already served, provided, however, in the event any subscriber is in a remote or inaccessible location, the Grantee shall have the right to charge such subscriber for material and labor expended by Grantee in providing such service connection, in excess of the cost of extending service generally to subscribers without charge to them. The City Council will make the final

determination of whether or not a subscriber is in a remote or inaccessible location and liable for line extension charges, and such determination of whether or not a subscriber is in a remote or inaccessible location and liable for line extension charges shall be final and binding upon the Grantee.

SECTION 8

The franchise is governed by and subject to all applicable rules and regulations of the Federal Communications Commission, specifically including Part 76 and by the laws of the State of Florida. Should there by any modifications of the provisions of Section 76.31 of the Rules and Regulations of the Federal Communications Commission resulting from amendment by the FCC which must be incorporated into this franchise, the City and the Grantee agree that such incorporation shall be accomplished within one (1) year after the effective date of the FCC's adoption of the modification, or upon renewal of this franchise, whichever occurs first. However, the right is hereby reserved to the City to adopt, in addition to the provisions herein contained and existing applicable ordinances, such additional ordinances as it shall find necessary in the exercise of its police power, provided that such regulations shall be reasonable and not in conflict with the terms hereof, the laws of the State of Florida, the laws of the United States of America, or the rules of the Federal Communications Commission. If any section hereof is determined to be illegal or inconsistent with any Federal or state law, all other portions of this ordinance and franchise shall remain valid, and the inconsistent provisions shall be deemed invalid, so that the ordinance and franchise shall continue in full force and effect. To the extent that the ordinance and franchise must have additional clauses added so as to be consistent with Federal or state law, such clauses shall be added as expeditiously as reasonably possible after consultation between the City and Grantee and shall be reasonable and, to the extent possible, not inconsistent with the terms hereof.

SECTION 9

The term of this franchise shall be for a period of fifteen (15) years commencing _____, 19____, and continuing for a total of fifteen (15) years thereafter.

SECTION 10

During the term hereof Grantee shall substantially meet the material technical requirements as required by the FCC for the Niceville system under its technical standards, as they may be amended from time to time. The City shall have the right, to be exercised no more frequently than one time each year, to engage a third party to objectively examine Grantee's technical data collected by the City's TV Consultant and the Grantee under the FCC's technical standards and under Grantee's technical testing procedures and/or to objectively conduct tests of his own pursuant to the FCC's and Grantee's technical procedures. The third party will be a neutral party who is recognized for his experience in cable television technical matters, and his selection will be mutually agreed upon by Grantee. The costs of the third party advisor, which shall be reasonable and substantiated, shall be borne equally by the City and the Grantee. Any report by the third party as to Grantee's conformity with the FCC's technical standards shall be in the form of a written certification containing only findings of fact that the Niceville system has or has not met such FCC technical standards on the dates of testing. If the certification states that the system is not in compliance with the FCC's technical standards, the third party shall objectively specify in detail each failure to comply. Any such certification shall be delivered in writing to Grantee, return receipt requested, at the same time it is delivered to the City. The Grantee shall have fifteen (15) regular business days after receipt of the certification in which to discuss and attempt to resolve with the third party and the City any disagreement which it may have with the neutral third party's findings of fact or methods of reaching them. If the system is, in fact,

not in compliance with the FCC's technical standards, Grantee shall then have sixty (60) regular business days from the expiration of said fifteen (15) business-day period in which to rectify, or make a reasonable attempt in view of the time limitations to rectify, the failure to comply. The City, Grantee, and the third party shall all give reasonable cooperation to one another so as to enable Grantee to meet said test. At the end of the said sixty (60) business-day period or at such earlier times as Grantee states that the failure has been corrected, the neutral third party may, only as pertains to the earlier found failure, objectively examine Grantee's technical data collected under the FCC's and Grantee's technical testing procedures and/or objectively conduct tests of his own pursuant to the FCC's and Grantee's technical testing procedures. Any report by the third party as to Grantee's conformity with the FCC's technical standards regarding the earlier found failure shall be in the form of a written certification containing only findings of fact that the Niceville system has or has not met such FCC technical standards on the date of testing. If the third party's certification states that the system is not in compliance with such FCC technical standards (regarding the earlier found failure), the third party shall objectively specify in detail each failure to comply. Any such certification shall be delivered in writing to Grantee, return receipt requested, at the same time it is delivered to the City. If the earlier found failure has not been corrected and if a reasonable attempt in view of the time limitations to correct it has not been made within the sixty (60) business-day period, with the result that the standard set forth in the first sentence of this paragraph is not met, after due process proceedings. the City shall have the right at its discretion to revoke the franchise, provided, however, that the City has met all of its obligations hereunder, and provided further that if any such revocation action is to be taken it shall be taken within, and no later than, thirty (30) regular business days after termination of the sixty (60) day period.

In addition to the foregoing, if the Grantee should substantially violate any of the material terms, conditions or provisions of this franchise, or if the Grantee should substantially

fail to comply with any reasonable and material provisions of any ordinance of the City not in conflict herewith regulating the use by the Grantee of the streets, alleys, easements or public ways of the City, and should the Grantee continue to violate and fail to take reasonable action to rectify the same within a period of sixty (60) days after the Grantee shall have been notified in writing by the City to desist from such violation so specified, then the Grantee shall be deemed to have forfeited and annulled, and shall thereby forfeit and annul, all the rights and privileges granted by this franchise, provided that such forfeiture shall be declared by a court of competent jurisdiction after hearing and upon appropriate full and final findings as prescribed by law.

It is understood that due to failure arising from the aging of the system and/or the particular corrosive atmospheric environment in the City and arising outside Grantee's normal technical operations and maintenance of the system; that due to possible changes during the term hereof in technology; that due to circumstances beyond Grantee's control (such as, without limitation, acts of God, lack of cooperation from local utility companies and governmental departments, strikes, and tardy equipment deliveries); and that due to possible changes in the federal, state, and/or local laws, Grantee may be unable to complete any necessary corrective action within the designated time periods specified in this ordinance. In any such event, revocation action will not be taken, and Grantee must give notice thereof to the City and must make a reasonable, good faith attempt to rectify any failure, in view of the circumstances, as expeditiously as is reasonably possible.

The City may engage the services of a City TV Consultant, agreeable to both the City and the Grantee, at any time during the term of the franchise for the purpose of collecting the data referred to in this Section of this ordinance and the reasonable and customary fees and expenses of such TV Consultant shall be paid by the Grantee; provided, however, such sum payable by the Grantee shall not exceed $2,500.00 per year.

SECTION 11

The Grantee may surrender this franchise at any time upon filing with the City Clerk of the City a written notice of its intention to do so at least eighteen (18) months before the surrender date. On the surrender date specified in the notice, and provided that all of Grantee's obligations, duties and liabilities under this Ordinance have been fulfilled and finally discharged, all of the rights and privileges and all of the obligations, duties and liabilities of the Grantee shall terminate.

SECTION 12

All of the rights and privileges and all of the obligations, duties and liabilities created by this franchise shall pass to and be binding upon the successors or assigns of the City and the successor and assigns of the Grantee, and the same shall not be assigned or transferred without the written approval of the City Council, which approval will not be unreasonably withheld; provided, however, that this section shall not prevent the assignment of the franchise by the Grantee as security for debt without such approval and provided further that if no final action by the City on any application is taken within forty-five (45) days after application is tendered, the application shall be deemed granted.

SECTION 13

In consideration of the terms of this franchise, the Grantee agrees to pay to the City a sum of money equal to five percent (5%) of the Grantee's gross subscriber revenues per year. Such annual sums shall be payable in four (4) quarterly payments being at the end of each quarter, namely: March 31, June 30, September 30 and December 31. Each quarterly payment shall be paid within sixty (60) days after the end of the quarter. In respect to this provision, the City and Grantee hereby acknowledge and agree that incorporated into the consideration herein provided is compensation to the City for its

services and expenses in continually monitoring and evaluating the standard of performance of Grantee for the benefit of the public, and the City's services and expenses in implementing and cooperating in and with the complaint procedures set forth herein.

Provided however, that during the term hereof should Grantee hereafter pay a rate of compensation for a cable television system franchise in Okaloosa County, Florida, which is greater than the rate provided for herein, the rate of compensation, on the basis of percentage only, shall be readjusted to that greater rate to be effective commencing, and corresponding with the annual compensation period next arising under the terms hereof following the effective date of Grantee's agreement to compensate the other Okaloosa County, Florida, franchisor(s) at a rate greater than five percent (5%).

The Grantee shall keep complete records of account showing dates and payments received. The duly authorized agent appointed by the City shall have the right, power and authority, at the expense of the City, to inspect and audit the current records of gross revenue of the Grantee at any reasonable time. The gross revenue records of the Grantee for any annual period shall be closed to the City after three (3) years from the said annual anniversary or after an audit of such records has been made.

Nothing herein shall be construed as requiring the Grantee to pay the City any portion of the revenue derived from the sale of cable television service by the Grantee to customers residing outside of the corporate limits of the City. However, upon the annexation to the City of any territory not now within the corporate limits of the City, the portion of the Grantee's facilities that may be located within such annexed territory and upon the streets, alleys or public ground or places thereof, shall thereafter be subject to all the terms of this franchise as though it were an extension made thereunder.

SECTION 14

This Ordinance when accepted by the Grantee shall be and become a valid and binding contract between the City and the Grantee, but this Ordinance shall be void unless the Grantee shall, within thirty (30) days after the final passage of this Ordinance, file with the City Clerk of the City a written acceptance of this Ordinance and the franchise herein granted.

SECTION 15

At the expiration of the term of this franchise, the City shall have the right to purchase, at fair market value, all of the physical properties and assets of the Grantee used under the term of this franchise; such fair market value to be determined by the report of the majority of three (3) arbitrators, one (1) to be selected by the City Council, one (1) by the Grantee, and the third by the arbitrators so selected, provided however, should the Grantee refuse for thirty (30) days to select the arbitrator, then a Judge of the Court of competent jurisdiction over such a case shall be authorized to appoint the third arbitrator; and upon expiration of the term of this franchise the City shall have the right to negotiate a new franchise with Grantee, or negotiate a new franchise with a different person, company or corporation, or renew this franchise agreement with Grantee, whichever the City in its sole discretion and exclusive judgement shall elect.

SECTION 16

Whenever in this Ordinance either the City of Niceville or the Grantee corporation is named or referred to, it shall be deemed to include the respective successor, successors or assigns of either, and all rights, privileges and obligations herein conferred shall bind and inure to the benefit of said successor, successors or assigns of said City or of the Grantee.

SECTION 17

Any notices required or provided for herein shall be valid and deemed as given if made in writing and posted in the United States mails via First Class Registered Mail, Return Receipt Requested, in the following manner:

If to City:

City of Niceville
101 Armstrong Avenue
Niceville, Florida 32578

If to Grantee:

General Manager
Warner Cable Corp. of Niceville
Palm Plaza
Niceville, Florida 32578

with copies to:

Senior Vice President and General Counsel
Warner Cable Corporation
75 Rockefeller Plaza
New York, New York 10019

and

Vice-President and Regional Manager
Warner Cable Corporation
3485 Desert Drive
Suite 204
Atlanta, Georgia 30344

SECTION 18

If any section, sub-section, sentence, clause, phrase or portion of this agreement, or any resolution authorizing or approving this agreement, is for any reason held invalid or unconstitutional, such portion shall be deemed a separate, distinct and independent provision and such holding shall not affect the validity of the remaining portion hereof.

SECTION 19

This franchise shall be non-exclusive.

SECTION 20

After publication of this Ordinance in its entirety once each week for four successive weeks in the Playground Daily News, a newspaper of general circulation in Okaloosa County, Florida, this Ordinance and the contract and agreements embodied herein shall become effective on March 17, 1980.

ADOPTED in regular session this 12th day of February, A.D. 1980.

CITY OF NICEVILLE

/s/ RANDALL WISE
MAYOR

ATTEST:

/s/ GEORGE H. IRELAND
CITY CLERK

ORDINANCE NO. 583

AN ORDINANCE OF THE CITY OF NICEVILLE, FLORIDA, PROVIDING FOR THE ISSUANCE OF NOT EXCEEDING $2,000,000 CABLE TELEVISION REVENUE BONDS, SERIES 1985, OF THE CITY TO BE APPLIED TO PAY THE COST OF ACQUIRING AND CONSTRUCTING A CABLE TELEVISION SYSTEM TO BE OWNED AND OPERATED BY THE CITY; PROVIDING FOR THE PAYMENT OF THE 1985 BONDS FROM THE NET REVENUES OF THE SYSTEM AND THE EXCISE TAXES DESCRIBED HEREIN, INCLUDING COVENANTS AND AGREEMENTS IN CONNECTION THEREWITH; PROVIDING FOR THE SEVERABILITY OF THE PROVISIONS HEREOF; AND PROVIDING AN EFFECTIVE DATE

* * *

Section 2. Definitions

* * *

"Excise Taxes" shall mean the Sales Tax Revenues and the Revenue Sharing Funds.

* * *

"Revenue Sharing Funds" shall mean the guaranteed entitlement portion of the revenue sharing trust funds of the State of Florida as defined in and distributable to the Issuer pursuant to Chapter 218, Florida Statutes.

"Sales Tax Revenues" shall mean the proceeds of the local government half-cent sales tax, as defined and described in, and distributed to the issuer under, Part VI, Chapter 218, Florida Statutes.

"Serial Bonds" shall mean any Bonds for the payment of the principal of which, at the maturity thereof, no Amortization Installments are required to be made prior to the twelve-month period immediately preceding the stated date of maturity of such Serial Bonds.

* * *

Section 16. COVENANTS OF THE ISSUER. Until all principal of and interest on the Bonds shall have been paid or provided for as herein permitted, the Issuer covenants with the Bondholders as follows:

A. APPLICATION OF EXCISE TAXES. All of the proceeds of the Excise Taxes, as soon as the same are received by the Issuer, shall be deposited into a special fund which is hereby created and designated the "Excise Taxes Fund."

Whenever by reason of the insufficiency of Gross Revenues in the Revenue Fund, the Issuer is not able to make promptly the payments hereinafter required to be made into the Sinking Funds, the Bond Amortization Account and the Reserve Account, there shall be paid, into such Fund and Accounts, no later than on the 20th day of each month in each year, from the moneys on deposit in the Excise Taxes Fund, whatever sums are necessary to cure such existing deficit. Whenever all of the herein required current payments have been made into the Sinking Fund, the Bond Amortization Account, and Reserve Account, the balance of any moneys on deposit in the Excise Taxes Fund may be withdrawn on the 20th day of each month in each year and used by the issuer for any lawful purpose.

B. EXCISE TAXES COVENANTS. The Issuer has full power to irrevocably pledge the Excise Taxes to the payment of the principal of and interest on the Bonds, and the pledging of the Excise Taxes in the manner provided herein shall not be subject to repeal, modification or impairment by any subsequent resolution, ordinance or other proceedings of the issuer or by any subsequent act of the Legislature of Florida.

(2) The Issuer shall be obligated so long as any of the Bonds are outstanding and unpaid, to take all lawful action necessary or required to continue to entitle the Issuer to receive the Excise Taxes in such amounts and at such rates up to the maximum amounts or rates as are now or may hereafter be provided by law to provide Excise Taxes in each Fiscal Year sufficient to pay one hundred twenty-five per

centum (125%) of the Bond Service Requirement becoming due in such Fiscal Year and one hundred per centum (100%) of all Reserve Account deposits required to be made in such Fiscal Year.

EXCERPTS FROM MINUTES OF NICEVILLE CITY COUNCIL

STATEMENT OF COUNCILMAN GARY A. BROWN, CHAIRMAN OF CABLE TELEVISION COMMITTEE

???. You don't think Warner will put a law [suit] against us?

BROWN: I don't think it'll have much merit. I think the law as it stands now basically, expressly says that if there is no competition in the area of the municipalities, then they provide that competition.

CORBIN: And the fact that you have a strong referendum behind you, would, uh . . .

BROWN: Nah, I'll say this, too, uh, there are no, there are no, there is not, there is not gonna' be a competitive system in Niceville.

(Minutes of Niceville City Council; Feb. 18, 1985)

STATEMENT BY THOMAS K. MILLER, CABLE CONSULTANT TO NICEVILLE

Miller: . . . Warner has about 3,400 customers here. Figuring you'd [the City system] get 75 percent of their customers—it's 75 percent of Warner's customers, which I don't think would be that hard to do. They have, uh, they have been here such a long time, they have uh, they have uh not too good of a rapport with this City at this time which is obvious because you're talking about cable right now. Get 75 percent of them 3,400 customers, you're looking at 2,565 customers and I think that's a realistic number to get. I think if the City, looking at the worst case scenario, if they try to compete—they try to rebuild, I believe because of them being here this long, their service being what it has been, uh, the position they put themselves in without anybody's help, I believe that uh, if they did exactly what Niceville did, we'd, we'd of stood the possibility of getting 75 percent of their customers. And the next thing is, is if Niceville were to rebuild before they were, I don't see that they're gonna' rebuild. I see 'em rebuilding Bluewater Bay, but not, not the people we're looking at.

(Minutes of Niceville City Council; June 10, 1985)

SELECTED PORTIONS OF THE RECORD BELOW

TESTIMONY OF GARY BROWN
MEMBER OF NICEVILLE CITY COUNCIL AND
CHAIRMAN OF CABLE TELEVISION COMMITTEE

Q. Do you recall the controversy or the objections concerning the Christian religious programming?

A. I recall the—some general comments about the time I—I don't know the specific comments.

Q. Well, what was your recollection about the reason that the Christian religious programming became a part or concern of the city council?

A. Well, I can go by what's here. I think as Mr. Corbin [City Manager of Niceville] said, he'd had a lot of—according to this, Mr. Corbin had a lot of concern expressed to him about the removal of that channel [Jim and Tammy Bakker's Inspirational Network].

Q. Did you become involved in investigating that, or were there any concerns with you about it?

A. I don't recall specific concerns. As it indicated here, I think we voted to ask Warner to consider leaving the channel.

(Sept. 9, 1986; Dep. Tr. 12-13).

* * *

Q. Do you consider Mr. Miller's provision in his feasibility study that the payment of the bidirectional system, or two-way system for monitoring traffic and lift stations be paid from the general revenues of the system as being not feasible?

A. I think not feasible is a little too harsh a word.

Q. How would you describe it?

A. I would say that before the system shakes out method of payments, and cross charges to departments within the City will also have to be worked out. Again, we have poured very little concrete or dug very few holes to date.

(Oct. 7, 1986; Dep. Tr. 116)

* * *

Q. Well, the bidirectional services that you intend to provide. If there's a shortfall in the revenues from those bidirectional services, how do you intend to make up for those?

A. If those bidirectional services were strictly—were strictly related to water, sewer, et cetera, then I assume that they would be handled in the same fashion as if we had a shortfall in the sewer department.

Q. And how is that?

A. That's to increase rates or cut down on expenses.

Q. Now, whose rates are you intending to increase on the bidirectional? Are you talking about rates for bidirectional services, or all subscribers rates?

A. I'm talking about if the system is there to monitor water and sewer, then I assume that those—again, this is in an assumption—I would assume that those losses would be made up because of that, or they could be amortized over the entire system. I think it's an academic question.

Q. Another aspect of the bidirectional, two-way system is the security system and its medical alert, or burglar alert. Has the City of Niceville—or the City Council or the City staff obtained any marketing studies showing the market for these services in the City of Niceville?

A. No. As far as I know, best to my knowledge, I don't know of any direct marketing study. I know we have a continuing expansion of the intrusion system that's currently in effect that's in the police station. In fact, I believe they had to cease taking new members here awhile back because they used up all the telephone company's telephone lines. They had no more pairs running through there, as I recall.
(*Id.* 120)

* * *

Q. Would you expect [a bidirectional system] to be a break-even service?

A. Perhaps not; perhaps not. I haven't looked at the cost of that service.

Q. If it was not at least a break-even service, would you include that in the City of Niceville cable TV system?

A. I would hope to include that eventually, because I believe it to be important.

Q. Even if it wasn't break-even?

A. Perhaps, yes.

Q. And if there was a shortfall or was a breakeven, how would payment for that—pursued payment for that system to be made or covered?

A. I think there are several possibilities of perhaps general fund or public welfare.

(*Id.* 122)

* * *

Q. The next sentence says "The City has flexibility in both financing and payback not available to most private operators." Please explain what you meant by that statement.

A. Well, I thought that was a clear statement I had in there. The City has flexibility in both the—well, the bonds, the revenue bond, we usually receive a favorable rate on. The city has a good record in that, and gets a good bond rate, and has a good rating. There was some talk at one time that perhaps we could finance it ourself from reserves if necessary.

We don't pay—we don't pay income tax. That's no big secret. We don't have to make a profit to keep the stockholders happy. Now, most companies have to make a profit, otherwise people get very upset. There are some of our companies that don't always do that. It wasn't intended that they be nonprofit, it just seems to work out that way sometimes. But that was all I meant there, not everybody could get revenue bonds for building a cable system.

(*Id.* 124-125)

* * *

THE COURT: Let me ask it again so there's no misunderstanding. If your city's cable operations do not operate as projected but instead operate for a considerable period of time at a considerable deficit so that you have to come in with supplementing funds and to do that you're going to

have to increase taxes, that's your only source of revenue otherwise, I suppose. Right?

THE WITNESS: We have other taxes pledged to the bond issue.

THE COURT: And you have to increase taxes and you've got a city hall full of angry people out there saying, "We don't want to have our taxes increased," and let just assume without getting specific that there is some way you can exercise your regulatory discretion, and in so doing either pick up additional revenue or customers or both, from your competitor [Warner Cable], so that you don't have to then increase the taxes. Isn't that going to be a difficult decision for you?

THE WITNESS: I think it would be about as difficult as answering this question, sir.

THE COURT: Well, I'm not trying to put you in a corner but such things happen. You have to acknowledge that.

THE WITNESS: I understand. I'm trying to think of how I could do that. Not if I could do it but how I could do it. And frankly, nothing comes to mind. I would have to fight for the system if that's what you asking. I hope I could fight legally and within the framework of the law.

THE COURT: Isn't it true that you have a lot of people who live in the City of Niceville who do not subscribe to cable TV?

THE WITNESS: No, sir, that is not true.

THE COURT: Everybody subscribes?

THE WITNESS: Not everybody, but I think probably 85 percent or more.

THE COURT: There are 15 percent then, assuming it's 85 percent, who certainly don't gain anything by having cable TV service at all?

THE WITNESS: I think some of those 15 percent will have cable service on the Niceville system. That's historically what I read happens.

THE COURT: Assuming it's only 10 percent or 5 percent, there is a certain percentage that will never take cable TV, can't afford it, right?

THE WITNESS: That's correct.

THE COURT: They may pay taxes, right?

THE WITNESS: Yes, sir. But we are providing other city services. Our plan is to provide other city services too on the cable system, some of which I think every citizen will benefit from, even those who are not subscribing to the Niceville system.

THE COURT: But from your very testimony you have indicated that you're in a difficult situation trying to regulate a competitor. You don't quarrel with that.

THE WITNESS: No, sir.

THE COURT: I've gathered that throughout your testimony. Isn't that true?

THE WITNESS: Yes, sir.

(May 16, 1986; Trial Tr. 45-47)

* * *

Q. All right, and during that council meeting [May 10, 1988] did you not say, "The big hammer of the franchise was originally the rate control; if you're controlling somebody's money you are controlling them"?

A. I believe I said something along that line, yes.

(*Id.* 156)

TESTIMONY OF JESSE ALMA EDGE
MEMBER OF NICEVILLE CITY COUNCIL

Q. What kind of programs were [the Niceville subscribers] saying they didn't get?

A. Some for the children, some Christian programs, and then at one time the weather went off. We couldn't get the weather for a good while on Warner Cable, and they took off several of the programs.

Q. Did you convey those complaints to other members of the Council?

A. Well, they all—each person called each Council, yes, they did. But as far as us coming together and expressing ourself and all, it was the people calling us.

Q. So when you talked to the Council about those situations, it was at a Council meeting. Is that what you're telling me?

A. Sure. Sure. The people come to us, we didn't discuss it at all only, and we didn't discuss it with each other, is what I meant, at the meetings and all.
(Oct. 1, 1986; Dep. Tr. 7-8)

* * *

Q. Did you ever hear complaints that Warner's making money and taking it out of Niceville and sending it to New York or someplace else?

A. I certainly have. Yes, I heard it.

Q. Did you ever hear complaints that people who live in Niceville, the decisions about what channels they get to watch, that those decisions are made by some guy over in Fort Walton, or some guy in New York City?

A. Yes, we haven't had no chance to get our own programs that we'd like. They've been changed, and changed and changed.
(Oct. 1, 1986; Dep. Tr. 44-45)

TESTIMONY OF LANNIE L. CORBIN
CITY MANAGER OF NICEVILLE

Q. Mr. Corbin, do you remember the situation dealing with the subject matter of Exhibit 91?

A. I think it refers to PTL as being removed from cable service.

Q. And PTL means "Praise the Lord," as I understand it. Is that the program?

A. Yes, sir.

Q. It is a religious network program. Is that your understanding of it?

A. It is religious, right.

Q. Now, did Warner—did you call Warner before this matter became an item on the agenda for the City of Niceville?

MR. WELLS: Do you mean him personally?

MR. MOORE: Yes, sir.

A. Probably did.

Q. And talked to their manager?

A. Uh-huh.

* * *

Q. Mr. Corbin, the City objected, the Council made objections to the move [of the Jim and Tammy Bakker PTL Network] from Warner. Is that your understanding?

A. Mr. Moore, I believe the Mayor wrote a letter to Warner Cable expressing their concern about moving it. How that relates to the franchise, I do not remember.

(Oct. 8, 1986; Dep. Tr. 38-39, 41-42)

* * *

Q. If I could direct your attention to what is Roman numeral III.

A. Okay.

Q. To the best of your recollection, by March 11, 1986, had the City executed 19 affiliate agreements?

A. To the best of my knowledge.

(Oct. 31, 1986; Dep. Tr. 5).

LETTER COSMIC COMMUNICATIONS TO NICEVILLE CITY MANAGER (EXHIBIT 132)

March 11, 1986

Mr. Lannie L. Corbin
City Manager
208 Partin Drive
Niceville, FL 32578

Re: System Update February 1986

Dear Lannie:

The following is a categorized report on the status of the cable system for the month of February 1986.

* * *

III. Program Affiliate Agreements

The City has received in 19 affiliate agreements.

* * *

Very truly yours,

/S/ Tom

Thomas K. Miller
President

TKM/ss

LETTER FROM PTL'S THE INSPIRATIONAL NETWORK TO NICEVILLE CITY MANAGER (Exhibit 118)

November 20, 1985

Mr. Lannie L. Corbin
City Manager
Niceville Cable Communications
208 Partin Drive
Niceville, FL 32578

Dear Mr. Corbin:

Thank you for the returned contract. Benefiting most from our relationship will be the subscribers in your respective franchises. These subscribers appreciate as a part of their total lifestyle a programming format which has a direct or underlying message of hope and faith. This is what PTL—The Inspirational Network offers.

Enclosed herewith is your copy of the contract duly countersigned. I look forward to a long and mutually beneficial relationship.

Kindest regards,

/S/ Jackie Bradley

Jackie S. Bradley
Senior Account Executive

JSB:pem
Enclosures

LETTER FROM COSMIC TO NICEVILLE CITY MANAGER (Exhibit 103)

November 5, 1985

Mr. Lannie L. Corbin
City Manager
City of Niceville
208 N. Partin Drive
Niceville, Florida 32578

Dear Mr. Corbin:

On November 1, 1985, Cosmic Communications, Inc., requested of all program suppliers an Affiliate Agreement Contract for their respective channel(s). The request was made by Cosmic on behalf of the City of Niceville.

Please find enclosed the draft that was used for the Satellite and Premium channel programmers.

Also, listed below are the Satellite and Premium Channel(s) the respective letters were sent to.

Satellite

Channel 17 WTBS
Cable News Network
Cable News Network (HN)
Nickelodeon
Arts and Entertainment
Financial News Network
Lifetime
Channel 9 WGN
USA Network
The Discovery Channel
Channel 9 WOR
ESPN
The Nashville Network
The Weather Channel
Black Entertainment Television
CBN
PTL
Video Hits 1
MTV
C-SPAN
Country Music Television
Satellite Programming Network

Premiums

HBO
Showtime
The Disney Channel
Cinemax
The Movie Channel

If you have any questions, please feel free to contact me at 678-3878.

Sincerely,

/S/ Cyndia A. Miller

Cyndia A. Miller
Vice President
Administrative Services

TESTIMONY OF THOMAS K. MILLER PRESIDENT, COSMIC COMMUNICATIONS CABLE CONSULTANT TO NICEVILLE

Q. Dealing with Exhibit No. 48 [Christian Broadcasting Network (CBN) Affiliate Agreement]. When it was received did you review that document prior to submitting it to the City for execution?

A. Did I?

Q. Yes, sir.

A. I don't recall reviewing this specific one.

Q. Did you know that the CBN cable affiliation agreement was an agreement for three years?

A. Most all the agreements are for a period of three years generally; some can be longer, but in general most of them are for three years. I think that was presented in our feasibility study under the expenses, but normally the agreements are signed for three years.

Q. Did you specifically discuss with Mr. Corbin [Niceville's City Manager] that the CBN agreement, that is, Exhibit No. 48, was a three-year agreement?

A. I didn't.

Q. Exhibit No. 49. Dealing with Exhibit No. 49, can you tell us generally what type of network PTL is?

A. That stands for Praise The Lord Network. It's basically a family inspirational network.

Q. Does it deal with the Christian religion, as opposed to some other type of religion?

A. I believe it represents primarily that faith. I'm not sure if they have other programming that might deal with other faiths.

(June 6, 1986; Dep. Tr. 60-61)

TESTIMONY OF WAYNE GOODSON
ASSISTANT CITY MANAGER OF NICEVILLE

Q. Now, let me see if I can trace some history of the events that occurred. Do you recall any instance involved in which a Christian religious program [Jim and Tammy Bakker's PTL Inspirational Network] became an issue before the City?

A. Yes, I do.

Q. What do you recall about it?

A. Well, I recall that a couple of religious channels were going to be terminated by Warner Cable, and also the Super Station, and there was a lot of public opposition to that in Niceville. Mayor Wise forwarded a letter at that time to Mr. Peden expressing the concern Niceville had about the programming changes.

(Oct. 3, 1986; Dep. Tr. 18)

* * *

Q. Yes, would a city system have a cost that would be less than say Warner's investment as a private industry?

A. We do not have to be concerned as much as private industry with making a profit. We need to be concerned about being able to replace the system after a 15-year period. We need to be concerned about having the operation and maintenance capability to service the system. But I think it's pretty well accepted that because we do not have sharehold-

ers, people who are interested in making money off of TV, that we can provide more for less as a municipal system. (*Id.* 39-40)

TESTIMONY OF WILLIAM C. FRAY, JR.
FINANCIAL ADVISOR TO CITY OF NICEVILLE

Q. In your capacity as the financial advisor, what did you see as your role in the preparation of the bond ordinance?

A. To provide a structure, security arrangements for the bond issue, flow of funds, and ways to secure the bond issue in such a way that the City could secure as advantageous an interest rate on the financing as possible.

Q. This is the information then that you furnished to Mr. Livermore?

A. To whom?

Q. Mr. Livermore—Dan Livermore?

A. He developed a good part of that, but we worked jointly to make sure that the financial part of it and the legal part of it are in concert.

Q. What I'm trying to find out is what your involvement was from the financial aspects. So can you—

A. We reviewed the document and found, with a few minor changes, that it was proper.

We wanted to have a document set up that provided the half-cent sales tax and the guaranteed entitlement portion of the state revenue sharing funds as security for the financing, knowing that that would reduce the cost of borrowing to the City.

(Sept. 30, 1986; Dep. Tr. 27-28).

* * *

Q. So what you were recommending is that the excess revenue above what it costs to operate be used—of the TV cable system—be used to pay off the debt. Is that what you're saying?

These two additional revenues are pledged to that bond. Is that what you are telling me?

A. I'm saying that regardless of feasibility, that second layer of security—we recommend that a second layer of security be added to this bond issue to help reduce the borrowing cost of financing this particular project.
(*Id.* at 60)

* * *

Q. Did you discuss with Mr. Miller the insertion in any of his reports of funds to buy land?

A. Did I discuss with Mr. Miller the use of some of the bond proceeds for the purchase of land?

Q. Yes, sir.

A. Not to my knowledge.

And what was included in the cost of construction—there might have been some numbers included in the $1,550,000, if that's the right number—I believe it is—land may have been included in that. But as a separate item and as a separate point of discussion, I don't recall that.

Q. What impact on the feasibility of the bond would a $1.2 million error have?

A. These bonds are secured by—primarily secured by revenues of half-cent sales tax and guaranteed entitlement. That is the way the issue has been structured, so that it stands alone and independent from any losses or gains of the system.
(*Id.* at 108).

* * *

Q. At this point, and that is today, are you satisfied that a city-owned CATV system is economically and technically feasible in Niceville?

(Pause for counsel to confer with witness)

A. Like I've said before, the bond issue has been structured to be paid off from funds other than the cable system, and in that regard we are satisfied that these bonds can be paid off regardless of other revenues that may or may not be received.

Q. And regardless of whether it's even technically feasible?

A. The bonds—yes, we're convinced that we will complete the structuring of a financing that will be paid off. We are comfortable with that assumption. That does not mean that we're not concerned with the financial feasibility of the cable system.
(*Id.* 134-35)

TESTIMONY OF GERHARD J. HANNEMAN
EXPERT WITNESS FOR NICEVILLE

Q. What sort of resources do they [Niceville] have?

A. They're a city. They've got trucks, and they've got staff and a billing system, which a traditional, from a traditional overbuild, where a start up has none of that. Do they wish to cross-subsidize from other departments and other resources, and they're willing to sustain losses to this level, if this is significant, yeah, it's not; then it's okay.

To the degree that they're not willing to cross-subsidize and sustain it, I question the feasibility in some of these scenarios.

Q. Would you think that without cross-subsidization that this is feasible?

A. Without subsidization in the early years, this system will run a deficit. I say, again, I don't know if that's feasible to the City of Niceville or not.
(Jan. 25, 1988; Dep. Tr. 21)

* * *

Q. Twenty-five per seven manual basis?

A. That's the initial cost to get a new sub. and then for maintenance, plus the high level of churn that I believe to be the case in Niceville, it will be a higher number than 1200 a year by triple, quadruple, at least. It would be about $2 a customer per year.

Q. Two dollars per customer per year?

A. Yeah, minimum. That would be about four or $5,000 assuming that Niceville hits 2,000 subs ultimately. I would believe that that number is too low in the early years. I qualify that again. The City of Niceville, again, has access to

resources that independent operators wouldn't. That is, they have regular communication through all citizens of the community through water bills and so forth.

Q. Would that give Niceville an advantage in marketing; do you think?

A. Yes, I do.

(January 25, 1988; Dep. Tr. 24).

* * *

Q. If we could pause there for a second. Could they service the debt?

A. There are many, many issues related to making sense and overbuilt feasibility, but in this particular issue, we were asked to focus on the financial aspect related to the bond issue.

Q. Did you form an opinion on whether they could service their debt?

A. I did.

Q. What is your opinion?

A. It's shaky.

(*Id.* 27)

* * *

Q. I had asked you earlier about the technical aspects, and let me see if I can separate, and if your opinion would be the same as it would deal with the technical feasibility of the system. Do you agree that the technical feasibilities as contained in this study, that the city can accomplish a goal of constructing a competitive cable communication system?

A. Well, the world has changed quite a bit with the cable act which must carry on and off again with telephone return for security instead of two-way plan, so I will say that for 1985, if your question relates to the integrity of the design, it's a 1985 design, that would be fine. Would the cable industry do this in 1987, no, they wouldn't. It's overkill.

Q. Overkill in what aspect?

A. The 550 for one. Power costs and other maintenance problems. The two-way capability is overkill nowadays in terms of current thinking.

Q. How do you mean that that two-way system is an overkill?

A. Because the converter manufacturers and the pay-per-view providers have all made some arrangement of telephone return, either directly with a line plugged into the converter or through automatic identification systems through AT&T. That will negate the need for two-way plant. Two-way plant has come to be very, very expensive to maintain in a salt air environment. It's something the industry doesn't do much any more. But when this was written, they were still valid assumptions.
(*Id.* 79-81)

AFFIDAVIT OF EDWARD T. RUTTER
EXPERT WITNESS FOR WARNER, JULY 23, 1987

2. In my capacity as a consultant to the cable television industry I have frequently dealt with the subject of economic feasibility of a specific cable television venture, the appropriate rates charged for service, the impact of regulation and competition, and the need to provide a service package which will meet the demands and needs of the particular area in question. . . .

* * *

6. . . . Cable television, like traditional public utilities, is capital intensive which requires that large amounts of capital must be expended and cable plant put into place before any subscribers are connected. Because of this "capital intensive" characteristic, which requires that competition must duplicate the existing plant in kind, the diseconomies of direct competition are so burdensome that competition will not persist if only because it would lead to the bankruptcy of one of the operators. But even if competition were to persist, it is wasteful of resources because it involves wasteful duplication of cable, headends, towers, etc.

* * *

9. In my capacity as consultant to Warner Cable Communications, Inc., I have reviewed the City of Niceville, Flor-

ida's proposal . . . I discovered that in order to compete head-on with Warner in Niceville, the City must duplicate a cable television system that now serves approximately 82% of the existing households. Warner's existing cable television system provides a wide variety of service and capability similar to what the cable industry and its subscribers have adopted as state-of-the-art . . . Therefore, the City realistically cannot provide any service or capability that is not already in place in the existing system without subsidizing the cable operations, since historically cable subscribers themselves have not economically supported those "futuristic" services.

* * *

17. It is clear from my examination that the intent of the City is to drive Warner from the marketplace in order to then satisfy the public need that is now created by Warner's withdrawal, and thereby deprive Warner the opportunity to achieve a fair and reasonable return on its investment.

* * *

19. Based on the information available to us, and as contained in the City's financial statement, the Valparaiso cable communications system [a nearby municipally-owned cable system] is not self-supporting. In my opinion, when one considers that cable television is not an essential service and not every household is a subscriber, it would appear to be contradictory to the overall general public interest to have the communications system subsidized or funded from other than user charges.

TESTIMONY OF HARRY F. SHERAW
WARNER'S LOCAL MANAGER

Q. How many cable television systems provided by a private operator to residential subscribers offer bi-directional services of a fire, police, and health-protection nature?

A. I really have no idea how many in the United States.

Q. I'm not asking the number. I understand you don't know the number. I'm saying does anyone, to your knowledge?

A. In general I would say that it's a small portion of the 5,000-plus cable operators.

* * *

Q. Why hasn't it become more widely utilized?

A My general understanding is for two reasons: number one, that it is not an area that has proved to be break-even or profitable; and number two, there are alternative means to attain those services.

Warner held a subsidiary that was our security systems. We ultimately sold that out to Rollins who is a specialist in the burglary/fire protection services. We decided that it was an area that was best left to those people who were in that business.

Q. That is essentially, would you say, the reason why Warner has not considered bi-directional capability in its franchising in the Fort Walton area?

A. Correct, it is generally—it is an economic decision that we have not seen neither the customer request for, nor the need to put that additional investment in there to have it subsidized through the basic entertainment features.

Q. Now, when you were briefed about the political "lay of the land," if you will, around the time that you made the move in April, 1985, to Fort Walton, did you then come to understand that there was some interest in Niceville—at least in the residents of Niceville for that kind of service?

A. No, I don't recall that coming up as a conversation topic.

Q. That was never communicated to Warner, either through a newspaper article or in direct conversation, or in complaints or correspondence with subscribers?

A. It could have been conveyed to Warner. If it was conveyed to Warner or conveyed to the people who talked to me the day before I came down here, then they did not pass that information on to me.

Q. Did you learn about it later, after you relocated?

A. Yes. I might expand upon that. I learned subsequent or later to coming down here that the city was interested in that. I have not had customers personally request the services of me.

Q. Warner presently doesn't have the ability to service such a request, does it?

A. We do, in fact, have the capability for bidirectional. We do not have reverse amplifier modules, but the capability exists.

Q. You're saying that the new cable that has been run as part of the rebuild has the technical capacity to permit a bi-directional system is not in place or purchased?

A. That is correct.

(Oct. 13, 1986; Dep. Tr. 91-95).

TESTIMONY OF TERRY TISLOW
MEMBER OF CITY COUNCIL OF NICEVILLE

Q. And what way did you understand that a cable TV system would control traffic lights?

A. Well, as I understand it, it would be—that it would control the timing of the lights, and if one of them was messed up, then it would also indicate that.

Q. Do you know whether or not the City has any traffic control of the traffic lights today?

A. Well, what do you mean by the City having control? We have a person that can change the timing on them, that sort of thing, if that's what you mean by control of them.

(Oct. 15, 1986; Dep. Tr. 59)

* * *

Q. Have you had any discussions with Mr. Corbin about whether a timing system [for traffic lights] as controlled either by a cable system or any other system would in fact benefit the City?

A. I don't really think we know that—the answer to that. That's—in fact, just last night it was discussed that maybe a professional consultant coming in for the traffic problems here. I don't really believe anyone around here is qualified in

traffic control. I know I'm not. Of course, I believe in just shooting them through as fast as you can get them through, and then bringing them back home that night.

No—to answer your question—I don't believe anyone's qualified.

(*Id.* 60)

TESTIMONY OF WILLIAM JORDAN
MEMBER OF CITY COUNCIL OF NICEVILLE

Q. And have you made any comparison as to the economics of the system [alarm services] the City currently uses as it would deal with one operated through a TV cable line?

A. No, sir, I haven't made any comparison.

Q. To your knowledge, has anyone in the City made such a comparison, or such a study?

A. Not to my knowledge.

(Nov. 7, 1986; Dep. Tr. 35)

TESTIMONY OF WILLIAM W. McABEE
AUDITOR OF CITY OF VALPARAISO CABLE SYSTEM

Q. Then, for instance, if at a period of time the City [of Valparaiso, nearby to Niceville] went into the Vesper III system, the security system, and that cost "X" number of dollars, and the income was not adequate to recapture that, and the City wanted not to recollect [collect] that, that would be handled as a contribution from a municipality?

A. Yes.

Q. Now, are you familiar with whether that in fact has happened?

A. That might have been—if in fact it did happen—and vaguely I do remember something—but it probably was in the mind of the City Commission or the County—City Commission in this particular case—to make a determination not to recollect [collect] the money from the—or terminate collecting the money from the communication fund.

Q. As it shows between the 1984 and 1985 audit, do you have—is that—you know, to the best of your knowledge, is that the difference of the $202,000?

A. What page are you on?

Q. Exhibit D-1 of the 1985 audit.

A. That's probably the amount that was forgiven—net amount. So I gave you an incorrect answer at the time you asked me, because I really didn't know they had done this. I wasn't trying to mislead you.

(Sept. 2, 1986; Dep. Tr. 48-49)

Supreme Court, U.S.
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No. 90-1463

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

WARNER CABLE COMMUNICATIONS INC.,
Petitioner,

v.

CITY OF NICEVILLE, FLORIDA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

The respondent, City of Niceville, Florida, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the opinion of the Eleventh Circuit Court of Appeals entered in this case on September 12, 1990, and that court's denial of petitioner's motion for rehearing on November 16, 1990. The opinion is reported at 911 F.2d 634, and is reproduced at Petition App. 1a-19a.

STATEMENT OF THE CASE

This is one of three lawsuits involving the efforts of Warner Cable Communications Inc. seeking judicial intervention to prevent the City of Niceville from financing, constructing and operating a municipally-owned cable television system in competition with Warner's system in Niceville.[1] Although the City declared its intention to enter into the cable television business in late 1985, apparently provoking this litigation, the City has not yet obtained financing for such a system and has not begun construction of it. While the City has authorized the sale of revenue bonds in the amount of $2 million, has retained consultants, and has taken a variety of other steps toward planning a system, the record also discloses that there is presently no municipally-owned system in Niceville.

Warner asserts that the City's purpose is to achieve the complete elimination of Warner's operation in Niceville, but the record discloses that there were several circumstances leading to the five-member City Council's determination in September 1985 to enter into the cable television business. One factor was the Council's knowledge that the bordering city of Valparaiso, Florida, has, for many years, successfully owned and operated its own cable television system free from the type of technical

---

[1] The instant case was the first lawsuit brought by Warner against Niceville. Warner intervened in opposition in a proceeding filed in a state court by Niceville to validate the issuance of revenue bonds for financing the construction of Niceville's cable television system. The Florida Supreme Court's opinion affirming the validation of the bonds and finding that Niceville's project served a valid public purpose under Florida law is reported as *Warner Cable Communications Inc. v. City of Niceville*, 520 So.2d 245 (Fla. 1988), *cert. denied*, 488 U.S. 825 (1988). The third lawsuit was filed by Warner against the City of Niceville in the Florida state court alleging, in a 17-count complaint, a wide variety of reasons why the City should be enjoined from proceeding further. A Florida appellate opinion in this case is reported as *Byrd v. City of Niceville*, 541 So.2d 696 (1st DCA Fla. 1989), and the case is presently pending further review before that court.

problems and consumer complaints which have plagued Warner. The Valparaiso system operates at a significantly lower cost to subscribers than does Warner's system in Niceville.[2] In addition, the neighboring Valparaiso municipally-owned system provides customers with a bi-directional function that permits subscribers to utilize their cable system for burglary, fire, and medical alert monitoring at an extremely low cost.

Another factor prompting the Council to consider a municipally-owned system has been the very vocal demand from the citizens of Niceville upon their elected officials to have such a system. This demand has been expressed in several ways. Each of the five members of the Niceville City Council individually and collectively as a Council received a large volume of constituent complaints regarding the quality of Warner's service (frequent interruption of programming, nonresponsiveness to customer complaints, and problems with the extension of service to new residences in Niceville) and Warner's frequent rate increases. In addition to the constituent complaints voiced to Council members, the City Council on two occasions conducted organized opinion polls of the City's residents, and the results showed strong public demand for an alternative system.[3]

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[2] Warner's general manager freely conceded his understanding of Niceville customer dissatisfaction, driven in part by the knowledge that neighbors in Valparaiso received more programming at a lower cost. He candidly remarked that, "If I was a customer out there and, I was paying Warner $10 for 11 channels and saw somebody in Valparaiso getting 20-plus for $7, I would not be happy either." App. 4a-5a.

[3] In March 1984, four years after the City Council approved renewal of Warner's franchise, the Council conducted a questionnaire survey of its citizens regarding the desirability of an alternate cable television system. Of the 1,397 residents responding to the survey, 1,157 or 83% favored an alternate cable television system. Again in July 1985, the City Council placed on the municipal election ballot a "straw vote" question of whether voters favored the con-

Another significant factor contributing to the Council's interest in constructing and operating a city-owned, competitive cable television system was Congress' enactment of the Cable Communications Policy Act of 1984, 47 U.S.C. § 521, et seq. In February 1985, the Niceville City Attorney advised the City Council of the passage of the 1984 Cable Act, containing a provision specifically authorizing municipal ownership of a cable system, and requiring the establishment of an entity independent of the governing body for purposes of exercising editorial control over the programming content of such a system.[4]

Thus, despite Warner's suggestion that the Niceville City Council was motivated by Warner's elimination of religious programming, the record discloses, and three courts have agreed, that the wave of citizen complaints, the votes of the electorate, and the 1984 Cable Act together constituted the driving force behind the City Coun-

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struction and operation of a city-owned system. In that election, 1,202 persons voted in favor of such a system and 106 persons voted against it.

[4] 47 U.S.C. § 533(e) provides:

> (1) Subject to paragraph (2), a State or franchising authority may hold any ownership interest in any cable system.
>
> (2) Any State or franchising authority shall not exercise any editorial control regarding the content of any cable service on a cable system in which such governmental entity holds ownership interest (other than programming on any channel designated for educational or governmental use), unless such control is exercised through an entity separate from the franchising authority.

The City of Niceville passed an ordinance providing for the appointment of an independent entity to exercise programming decisions and make program selections for a Niceville cable system. Warner challenged the City's authority to do so in the instant case, and both courts below specifically found that the ordinance fully complied with the requirements of the Cable Act. *Warner Cable Communications Inc. v. City of Niceville*, 911 F.2d at 643-644; Petition App. 19a, 51a.

cil's September 1985 decision to enter into competition with Warner.[5]

Niceville's intention in constructing and operating its own competitive system was not simply to provide greater programming availability, greater locally-generated governmental, educational, and public interest programming, and a lower subscription cost than that being offered by Warner; it was also to utilize a municipal cable system for non-entertainment purposes. After the system is constructed and operational, Niceville's intention is to utilize the two-way capability of the system in much the same manner as the adjacent community of Valparaiso. Utilizing this capability, Niceville would be able to provide police, fire, and medical alert communications for its citi-

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[5] Throughout its petition, Warner strives to create the impression that the Niceville City Council was motivated by Warner's decision to drop the Jim and Tammy Bakker show and to make programming decisions in New York City. Petition 5, 9, 19, 21-23, and 24. Warner points to a fragment from the record as a pivotal fact, utterly ignored by the courts below, yet demonstrating Niceville's "evidence of censorial intent." The record itself, however, establishes the contrary. At a Council meeting in April 1982, some three and one-half years before the City determined to enter into competition wtih Warner, the City Manager reported to the Council that he had received a large volume of citizen complaints over Warner's then-recent decision to drop the PTL network (including the Jim and Tammy Bakker show) from its program lineup. At that meeting, the Council directed the Mayor to send a letter to Warner's local manager pointing out the receipt of some customer discontent, and suggesting that Warner reconsider its programming decision. Warner asked each of the Council members about their recollection of that event when their depositions were taken four years later in 1986. As reflected in Petition App. 76a, 80a-81a, 82a, and 87a, two Council members and two City staff officials responded, with varying degrees of recollection, that they did recall receiving complaints from Niceville citizens on those subjects and that the matter was resolved at that time. The trial court (at Petition App. 37a), the Court of Appeals (at Petition App. 2a-3a), and the Florida Court of Appeal have all found that the City Council was motivated by citizen complaints, the citizen votes which were taken, and the authority of the federal Cable Act. *Byrd v. City of Niceville*, 541 So.2d 696, 697 (1st DCA Fla. 1989).

zens.[6] The record below contains undisputed facts, referenced by the trial court in its opinion,[7] indicating that Warner's potential demise in the face of competition would not at all be the certainty which it predicts in its petition. For many years, Warner was the only cable operator in the nearby resort community of Sandestin, with approximately 1,000 customers on its system. In 1984, a second competing franchise was awarded to another company at Sandestin, which attracted 700 to 800 of Warner's customers. App. 1a-2a. Not only has Warner continued to supply cable service to the Sandestin resort after having lost approximately 80% of its customer base, it even went forward in rebuilding and upgrading its system in the face of that competition, and Warner has no plans to shut the system down. App. 2a.

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[6] Ironically, it was Warner which invented cable's bi-directional capability in the 1970's. Warner's general manager testified that this technology was marketed and utilized by Warner in Cincinnati, Houston, Dallas, Pittsburgh, and Columbus, Ohio. App. 3a. However, Warner had made a corporate decision that this use of a cable system did not produce what Warner considered to be a sufficient revenue stream, and it did not produce a profit. Accordingly, Warner abandoned that capability of cable television and has not made it available in Niceville. App. 3a-4a.

[7] In its order dismissing Warner's First Amendment claim on summary judgment, the district court found:

> . . . Since 1984, Warner has been operating in competition with another private system at the Sandestin Resort. Although Warner has lost 70% of its customers in that system, it has continued its Sandestin operations.
>
> . . .
>
> Furthermore, the outcome of a competition between Warner and the City will depend on what actions Warner takes in the future. Presumably, as the record indicates it has done in similar situations, Warner will attempt to compete with the City system. What effect this will have on the market is simply not capable of determination at this point. Even if there was evidence establishing that only one system can survive in Niceville, it cannot be said now that Warner will inevitably lose.

Petition App. 36a, 42a.

The courts below have correctly found that Niceville's intention was simply to construct a municipally-owned cable television system which would operate in competition with Warner.[8] The proposed Niceville system would offer a greater program selection than that available on Warner's system, would offer life and property protection services not available on Warner's system, would have its programming locally determined by an independent entity established in accordance with the Cable Communications Policy Act of 1984, and would do all of this at a cost lower than that presently charged by Warner to its Niceville customers. The City's intention is to have its own cable system financed through a bond issue,[9] to be repaid by the revenues of the system itself, with any unexpected revenue shortfalls being covered by two additional sources of non-ad valorem revenues authorized and provided for by Florida law.[10] Apart from this rather

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[8] In its order and memorandum opinion of March 10, 1989, the trial court stated:

> In adopting this ordinance, the City implemented its decision to compete with the plaintiff in the Niceville cable television market with a city-owned cable system.

Petition App. 20a. The Court of Appeals agreed that head-to-head competition is all that Niceville intends. 911 F.2d at 638; Petition App. 3a, 7a, 8a-9a.

[9] Warner states that the revenue bonds "will be sold to Niceville residents," who would then have a "powerful economic incentive" to sign on with the City's system. Petition 20. Although certainly no Niceville resident would be precluded from purchasing such bonds when they are issued, there is no evidence in the record giving substance to Warner's implication that the bonds will be purchased exclusively by Niceville residents, or that there is any requirement for residents to purchase bonds. The record shows that the City has engaged a financial agent whose intention is to market the bonds in established, national markets.

[10] The bond ordinance's secondary pledge of revenues, in the event that the cable system revenues are insufficient to retire the bonds, consists of the City's half-cent sales tax and its proportional share of the state's guaranteed entitlement of federal revenue sharing funds provided by Florida law. Petition App. 72a-74a.

traditional financing structure, the record is absolutely devoid of any evidence of an intention on Niceville's part to engage in what Warner refers to in its petition as "predatory economic competition." Petition 13.

In its petition, Warner attempts to construct an argument regarding Niceville's intent based upon two selected comments of one Council member, which are repeated throughout Warner's petition.[11] The record reveals, however, that these two comments were taken completely out of context and were not uttered in any relationship to the subject for which Warner has quoted them.[12] Ironi-

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[11] Warner references a comment of Councilman Gary Brown made at a February 18, 1985, meeting of the Niceville City Council. Mr. Brown is quoted as having stated, "There is not gonna' be a competitive system in Niceville." This comment is referenced in Warner's petition for the purpose of portraying a threatened prediction that Warner will not survive competition with a city-owned system. Petition 3, 7, 9. Additionally, Warner presents a portion of Mr. Brown's trial testimony where he acknowledges that at a May 10, 1988, council meeting, he remarked that, "The big hammer of the franchise was originally the rate control; if you're controlling somebody's money you are controlling them." Petition App. 80a. This comment is referenced in an attempt to establish that Niceville continues to have rate regulatory authority over Warner—a "fact" which Niceville disputed at the trial of the due process claim and which the lower courts determined need not be resolved.

[12] Mr. Brown's February 1985 comment stating that he did not feel that there would be competition is actually a reference to his views regarding competition between Warner and Cosmic Communications, Inc. The City Council had granted a second franchise to Cosmic five months earlier in October 1984. Mr. Brown explained that his concern at that particular meeting was, "We had not heard from Cosmic. We had no reason to believe that things were proceeding." App. 6a. His concern was that while a second franchise had been granted by the City to another private cable operator, there would "be no competition" in the City because the second operator had shown no signs of utilizing its franchise.

The second comment of Mr. Brown's, referencing municipal control of a franchise holder through the "big hammer" of rate regulation, was a statement made by him at a Council meeting on May

cally, the one Council member whom Warner quotes out of context in its petition is the very Council member referred to by the Eleventh Circuit Court of Appeals as having articulated an awareness on the part of the City Council to "maintain a level playing field" in which Warner and the City can compete. 911 F.2d at 642; Petition App. 16a.

In an attempt to conjure up a content-based, suppressive intent on the part of Niceville, Warner is taking a very different position from that which it has taken in the lower courts. The First Amendment issue was decided by the trial court on motion for summary judgment after an extensive record of facts had been filed with that court.[13] In submitting its brief in opposition to Niceville's motion for summary judgment, Warner simply argued that the only "dispute" before the court centered upon whether Warner would be economically forced to cease operation in the years following commencement of a city-owned system. In the extensive briefs filed with the trial court, Warner made not one mention of any reference to religious programming, the Jim and Tammy

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10, 1988, one week before trial of the due process issue in the trial court. The reference contained in Warner's Appendix is an excerpt of trial testimony where Mr. Brown acknowledges his remark of a week earlier. The very text of the quote, stating, "The big hammer of the franchise was originally rate control," is an obvious reference to the rate regulatory authority which Niceville possessed prior to the enactment of the Cable Communications Policy Act of 1984. The City has consistently taken the position throughout this case that it cannot regulate Warner's rates. Indeed, the trial court's opinion rendered after trial on the merits of the due process issue notes that, "City Councilman Gary Brown testified that, according to the information provided to him by the City's attorneys and its cable consultant, the City could not control the rates of Warner." Petition App. 25a-26a.

[13] The Court of Appeals noted that, "After extensive discovery and submission of voluminous factual materials to the district court, both parties moved for summary judgment." 911 F.2d at 636; Petition App. 4a.

Bakker show, or the quotes from Council member Brown which it parades throughout its petition in this Court as "evidence of censorial intent." Since the only dispute before the trial court on motion for summary judgment centered upon future occurrences, the trial court reasoned that these events were simply too speculative to permit adjudication. Accordingly, the court dismissed the First Amendment issue on grounds of justiciability. Petition App. 35a-45a.

Similarly, in its briefs to the Eleventh Circuit, Warner urged that the First Amendment issue was ripe for adjudication because it wanted to litigate at trial whether the city of Niceville constituted a "natural monopoly" and whether it would be forced out of business.[14] Again, Warner made no mention of the City Council's action in 1982 to forward a letter relating constituent complaints concerning program changes, or the quotes from a Council member which it is presently using in its petition to imply a municipal intent to do something more than compete with Warner.[15] Accordingly, reviewing the record before it, the court of appeals determined that even if

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[14] The Court of Appeals noted the lack of any evidence of suppressive intent:

> Warner implicitedly recognizes that Ordinance 58[3] does not target the content of Warner's speech and that the City does not have to meet the heavy burden of demonstrating a compelling governmental reason to support its action.

911 F.2d at 637, n.4; Petition App. 5a, n.4.

[15] In its initial Brief on Appeal, Warner did quote Councilman Gary Brown as stating, "I would have to fight for the [City's] system if that's what you're asking," quoting a portion of Mr. Brown's testimony to the court at the trial of the due process issue. App. 7a. Of course, Warner has abandoned the due process issue in this case, with both lower courts having found as fact that there was no evidence of any action or intention on the part of the City of Niceville to interfere with Warner's operation of its system in Niceville.

Warner's crystal ball proved accurate and that, over the course of time and competition, Warner were to make an economic decision to terminate its Niceville system, Warner would not have been deprived of its First Amendment rights.

The record of facts before the Court therefore presents a clear picture of a small community whose residents collectively have, for undoubtedly a variety of reasons, become intensely dissatisfied with their existing cable television operator. They have appealed to their elected officials to take action and provide them with an alternative cable system. The elected body made a determination to take that action and establish a municipally-owned system only after it had informed itself from independent consultants that such a system could be an economically viable venture, and could operate in active competition if only a portion of Warner's customer base could be attracted. The Council also determined that such a system could be utilized to provide its citizenry with a variety of life and property protection services which are currently being provided in an adjacent city. As both of the courts below have recognized, the purpose of Niceville has simply been to compete with Warner and to provide its citizens with an alternative which they have long demanded.

REASONS FOR DENYING THE PETITION

The operative facts and the opinion below establish that Niceville's contemplated action does not implicate Warner's First Amendment rights and, indeed, will foster the rights of listeners which lie at the heart of the First Amendment. In addition, as Warner is seeking a flat prohibition on a franchising authority's statutory right to enter the cable television business whenever there is an established private operator, Warner is in reality requesting this Court to judicially amend the Cable Communications Policy Act of 1984, by creating an exception which

Congress itself has rejected. Since head-to-head competition in the cable industry is only now beginning to expand with the approval of Congress and at the encouragement of the Federal Communications Commission, this case does not present an appropriate framework to explore the economic forces at work in the cable marketplace with a view toward further defining the contours of constitutional law in that industry.

I. NICEVILLE'S DECISION TO OWN AND OPERATE A CABLE TELEVISION SYSTEM DOES NOT IMPLICATE WARNER'S FIRST AMENDMENT RIGHTS.

Throughout this litigation, Niceville has never contested the proposition that Warner enjoys and is entitled to protection of its full panoply of First Amendment rights. As this Court has noted in several cases coming before it, cable television operators are engaged in First Amendment activities as they provide programming, whether retransmitted from signals generated elsewhere or locally originated.[16] Although cable operators are, in many respects, comprehensively regulated through the provisions of the Cable Communications Policy Act of 1984 and implementing regulations promulgated by the Federal Communications Commission, they are quintessential "speakers" in any community in which they operate. As one of the nation's largest multiple system operators, Warner has fully exercised its First Amendment rights in the City of Niceville, unimpeded by any City action.[17] Warner

[16] The most recent opinion is *Leathers v. Medlock*, —— U.S. ——, 59 LW 4281 (1991), where the Court recognized once again that cable operators are engaged in activities protected by the First Amendment, but held that the tax scheme involved in that case did not implicate those constitutional rights.

[17] In deciding Warner's due process claim, both courts below reviewed the extensive record of facts and concluded that Niceville had not taken any action adverse to Warner and is not presently threatening to do so.

has, in its sole discretion, determined the level of service which it provides, selected the programming which it delivers, and provided locally-generated programming. Warner's franchise was renewed in 1980, and despite a misstatement in its petition,[18] Warner will enjoy the renewal process guaranteed to it by the Cable Act.[19] If and when a Niceville-owned system becomes operational, Warner will continue to enjoy all of its rights under the franchise.[20] It will continue to be able to determine the programming it chooses to provide to its customers, and it will continue to have a free hand in generating its own programming in Niceville. As the lower courts in the instant case have concluded, Warner's rights to speak will continue unabated unless it determines for itself that it no longer chooses to deliver electrical signals through its cables in the City of Niceville. Although competition between the two systems will certainly occur if Niceville is able to finance, construct, and operate a city-owned system, the record is devoid of any indication that the City has targeted Warner "in a purposeful attempt to interfere with its First Amendment activities," or seeks to suppress "particular ideas." *Leathers v. Medlock*, —— U.S. ——, 59 LW 4281, 4283 and 4285 (1991). Based upon these facts, the opinion of the court below is fully consistent with the treatment of First Amendment rights of broadcast and cable speakers and their listeners and is fully consistent with the line of cases beginning with the seminal decision of *Red Lion Broadcasting v. FCC*,

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[18] "Finally, the city has the ultimate power over Warner—the power to refuse to renew its franchise." Petition 7.

[19] The Cable Act provides a process for franchise renewal, limits the basis for denial of renewal, and provides for judicial review of a franchising authority's adverse decision. 47 U.S.C. §§ 546, 555.

[20] Even if Niceville were to reacquire the right to regulate Warner's rates, there would be no obligation upon Niceville to exercise that right.

395 U.S. 367 (1969), concluding with the Court's recent decision in *Leathers v. Medlock, supra.*

In *Red Lion Broadcasting v. FCC, supra,* the Court repeatedly stressed that in application of First Amendment rights in the broadcasting field, it is the right of the public at large to effectively receive a maximum diversity of programming which is "paramount" and "crucial." 395 U.S. at 389-391. The Court emphasized, as well, that there is no First Amendment right on the part of a broadcaster to monopolize a particular reception market. This same approach was reiterated in *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 102 (1973), and *Leathers v. Medlock*, 59 LW at 4284, quoting *Cohen v. California*, 403 U.S. 15, 24 (1971). Focusing upon the intent of Congress in enacting statutory regulation of the broadcast industry, the Court has frequently been called upon to review "the long-established regulatory goals of maximization of outlets for local expression and diversification of programming," *FCC v. Midwest Video Corp.*, 440 U.S. 689, 699 (1979), and "the federal objective of ensuring widespread availability of diverse cable services throughout the United States." *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 717 (1984). Although the First Amendment value of citizens' access to diversity was not explicitly articulated in the Court's decision in *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986), it was clearly embraced within the Court's recognition of the First Amendment rights of the petitioning cable operator who was seeking to provide a second cable market to a portion of the City of Los Angeles.

The various courts of appeals which have had occasion to review broadcast and cable competition have, drawing upon *Red Lion* and its progeny, refused to apply First Amendment principles in such a manner as to preclude listeners from receiving a diversity of programming. *Community Communications Co. v. City of Boulder*, 660 F.2d 1370 (10th Cir. 1981), *cert. dismissed*, 456 U.S.

1001 (1982); *Tele-Communications of Key West, Inc. v. United States*, 757 F.2d 1330 (D.C. Cir. 1985).[21]

Niceville's intention is merely to compete for customers with Warner. It does not seek to influence Warner's programming decisions, Warner's distribution of services, Warner's communication with the residents of Niceville, or any other aspect of Warner's operation. The developing contours of First Amendment rights in the broadcast and cable television body of case law has, to date, established that the speaker's rights to speak do not predominate over the paramount rights of listeners and viewers to receive the widest possible range of programming. As the appellate court correctly concluded, there is presently no basis in First Amendment jurisprudence for enjoining or restricting Niceville from providing its citizens with the alternative which they have been demanding since 1985, after Congress expressly authorized the City's right to "speak" over coaxial cable.

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[21] Warner cites three appellate decisions for the broad proposition that courts in those instances have determined that "certain communities can economically support only a single cable system." Petition 17, n.15. Both *Omega Satellite Products v. City of Indianapolis*, 694 F.2d 119 (7th Cir. 1982), and *Community Communications v. City of Boulder*, 660 F.2d 1370 (10th Cir. 1981), *cert. dismissed*, 456 U.S. 1001 (1982), were decided prior to this Court's decision in *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986), and prior to passage of the Cable Communications Policy Act of 1984. Although the Court in *Central Telecommunications, Inc. v. TCI Cablevision, Inc.*, 800 F.2d 711 (8th Cir. 1986), *cert. denied*, 480 U.S. 910 (1987), did acknowledge the trial court's finding that the city involved in that case would ultimately support only one cable operator, it also stated that this Court's then-recent decision in *Preferred Communications* "implied that 'natural monopoly' is not a justification for exclusive franchising," *id.* at 716, and it further found the existing operator's defense to a $38 million antitrust violation based upon First Amendment grounds to be a disingenuous and unsuccessful defense.

II. BOTH MUNICIPAL OWNERSHIP OF CABLE TELEVISION SYSTEMS AND DIRECT COMPETITION AMONG CABLE OPERATORS ARE AUTHORIZED AND ENCOURAGED BY CONGRESS THROUGH THE CABLE COMMUNICATIONS POLICY ACT OF 1984.

In defining and determining the application of First Amendment rights in the broadcast and telecommunications media, the Court has frequently been guided by the determinations of Congress as they are embodied in regulatory legislation, and by the judgment of the Federal Communications Commission, designated by Congress as the agency responsible for implementation of congressional policies. As the Court examines existing statutory provisions and the intent of Congress as reflected by related legislative materials, the Court will find that municipal ownership and the encouragement of competition among cable operators are statutorily authorized. The Court will further find that the legislative product is the result of Congress' balance of First Amendment values in an industry which has experienced explosive growth over recent years and is presently in a phase of technological and economic transition.

The legislative purposes underlying the Cable Communications Policy Act of 1984 were plainly set forth by Congress in the Act. Those purposes include encouraging the growth and development of cable systems, encouraging the industry to provide the widest possible diversity of information sources and services to the public, and the promotion of competition in the cable industry. 47 U.S.C. § 521. In order to assist the cable industry in achieving those objectives, Congress carefully and deliberately fashioned ownership restrictions designed to prevent established television broadcasters and telephone service operators from quickly taking control of the cable industry, 47 U.S.C. § 533(a) and (b), while at the same time prohibiting franchising authorities from denying franchises to multiple system operators like Warner. 47 U.S.C. § 533(d).

In determining the forms of ownership which it desired to prohibit and those which it sought to foster, Congress expressly decided to permit ownership of cable systems by governmental franchising authorities. 47 U.S.C. § 533(e). The legislative history of the 1984 Cable Act reveals that in crafting the language authorizing municipal ownership, Congress was fully aware that cities were considering entry into the cable television business for reasons other than lack of interest on the part of the private sector.[22] The method employed by Congress to achieve its purpose in fostering cable competition while preserving First Amendment values has been to permit ownership by a franchising authority, accompanied by a statutory restriction upon that authority's ability to exercise editorial control over the content of most forms of programming. 47 U.S.C. § 533(e)(2). Again, the legislative history of the Act reflects that Congress intended this provision to incorporate the balance struck between

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[22] The House Committee Report accompanying P.L. 98-549 stated:

> Cable ownership issues arise in three contexts: municipal ownership of a system; a city's acquisition of a system from a commercial operator in the event of a breach of the franchise or upon expiration of the franchise; and efforts to diversify the ownership of cable systems.
>
> Most cable systems are owned and operated by commercial cable interests. Municipal ownership and ownership by nonprofit entities like cooperatives have traditionally evolved in communities where private companies were not particularly interested in offering cable services because of expected low return on investment.
>
> More recently, however, a number of larger cities have taken a close look at building their own cable systems as a profitable means of making cable more responsive to city residents' needs. While proponents applaud municipal ownership as a way to meet local needs, critics raise First Amendment concerns about government control of a part of the media. These concerns are addressed in the legislation.

U.S. Code Cong. & Adm. News 1984, p. 4664.

fostering competition and preserving First Amendment interests.[23]

Clearly, in authorizing cable competition between private operators and their franchising authorities, Congress was not concerned with the economic effect of that competition upon the competing operating entities. Congress implicitly rejected the notion that cable television is a "natural monopoly." [24]

Warner's petition virtually ignores the existence of the Cable Communications Policy Act of 1984,[25] and it makes no reference to the many statutory protections which Congress now provides to cable operators.[26] Warner is,

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[23] The House Committee Report states:

> Section 613(e) enables a state or franchising authority to own a cable system, but bars the state or franchising authority from exercising any editorial control over the content of any cable service provided over that system (other than programming on any channel designated for educational or governmental use), unless the editorial control is exercised through an entity separate from the franchising authority. The Committee has included this requirement in order to preclude undue government control of programming contrary to the First Amendment.

U.S. Code Cong. & Adm. News 1984, p. 4695.

[24] In 47 U.S.C. § 556(b), Congress provided for the continuing exercise of jurisdiction over cable services on the part of states. The State of Florida has also implicitly rejected the assumption that cable television is a "natural monopoly" when it provided a statutory process for franchising authorities to follow in granting overlapping cable franchises. Florida Statute 166.046 (1989), reproduced at App. 11a-13a.

[25] The only reference to the Act appears at Petition 7.

[26] The Act guarantees the use of public property, 47 U.S.C. § 541; limits franchise fees, *id.* at § 542; limits rate regulation, *id.* at § 543; prescribes the range of services, facilities, and equipment which may be regulated, *id.* at § 544; provides for the modification of existing franchise provisions with a right of judicial review, *id.* at § 545; and provides for a right of renewal or sale at fair market value, *id.* at §§ 546-547.

in effect, requesting the Court to strike a very different balance of interests from that determined by Congress, and it urges the Court to engraft a second restriction upon municipal ownership which Congress deliberately declined to fashion. Even if the Court were persuaded that the balance struck by Congress between the interests of fostering competition while preserving First Amendment values is somehow constitutionally deficient because of the Act's failure to guarantee that private cable operators should enjoy economic success, the operative facts in this case present a poor vehicle for attempting to correct what Warner argues was Congress' mistake. This is so because, until competition commences, the effects upon speakers, listeners, or viewers cannot be determined.

III. IN THE CONTEXT OF THE PRESENT STATE OF THE CABLE TELEVISION INDUSTRY, THE ISSUES PRESENTED DO NOT MERIT REVIEW.

Niceville fully concedes that First Amendment issues require wide protection in the courts, that the denial of certiorari in the instant case will remove one obstacle from Niceville's pursuit of its stated intentions, and that all private cable operators would appreciate and argue strenuously for insulation from competition from their franchising authorities. However, considering the present state of the cable industry as a larger context in which this case has arisen, Niceville respectfully suggests that the creation of new legal principles affecting the relationship between governmental franchising authorities and private cable operators is presently unwarranted.

At the time this case was tried, Warner conceded that the facts presented a "unique" circumstance in the cable industry. App. 2a. When Congress enacted the 1984 Cable Act, it was aware that existing municipal ownership of cable systems had arisen largely as a result of lack of interest on the part of private operators. In its petition, Warner points to more recently reported data

indicating that there are some 84 communities in which a franchising authority is considering competition with a private cable operator. Petition 12, n.11. There is no indication of how many communities are considering competition as a franchise renewal negotiation tactic, how many of those communities are being driven by intense customer dissatisfaction and voter demand, nor how many communities have reached the point that Niceville has in its determination. The fact remains, however, that there are very few communities which have determined to undertake the financial risk of competition, and this is the first such case arising after the 1984 Cable Act which has obtained appellate review. Apart from the assumed interest of most all private cable operators in obtaining an answer to the questions presented by Warner in its petition, this case, standing alone, presents only a single instance of municipal intention, driven by customer dissatisfaction and voter demand. The wide range of other interests and purposes which may now or in the future motivate other franchising authorities to compete with private operators is simply not before the Court. For example, other franchising authorities may be using the prospect of competition to extract franchise concessions from a private operator which would otherwise be prohibited by the 1984 Cable Act, or which a private operator would otherwise simply be unwilling to provide. A franchising authority may have as its purpose the operation of a new public enterprise, intended to produce a new source of municipal revenues. To the extent that a franchising authority's purpose or motivation, or the means which it selects to implement a competitive system, would be viewed by the Court as significant factors to be evaluated, this case provides an extremely limited opportunity for such review.

In enacting the Cable Communications Policy Act of 1984, Congress proceeded with deliberate caution, preferring to adopt a "wait and see" approach before engaging in further legislative adjustment of the industry.

Congress directed the Federal Communications Commission to provide a report at the end of the six-year period from the effective date of the Act. 47 U.S.C. § 543(h). The Commission was directed to report on the effect of rate deregulation on the industry and the effect of competition on the marketplace. The FCC issued its report to Congress in July 1990.[27] In its report, the Commission notes that its study has led it to conclude that the cable industry is still an evolving one. App. 8a. It urges Congress to review the progress of the cable industry and the legal framework under which it operates, App. 8a, and it also urges Congress to continue to allow competition to fluorish in lieu of reviving rate regulation. App. 8a-9a. The FCC notes that direct competition among cable operators has grown slowly, with less than 50 dual systems in operation, App. 9a, further observing that rates for cable service are significantly lower than the national average where such competition exists. App. 9a. The FCC informs Congress in its report that there are new technologies being implemented which, in combination with competitive cable systems, will likely have a significant impact on the industry over the next four to five years. App. 10a. The Commission states that, during this time, it will continue to encourage rival video providers to enter the market and invigorate the existing level of competition in the cable industry. App. 10a. Throughout the lengthy report, the Commission identifies several non-cable sources of programming competition which are presently in their infancy. These include wireless transmission of "cable" programming and direct satellite receipt of such programming. If these technologies continue to develop and gain widespread use, they are likely to supplant coaxial cable and the need for easements on public property altogether. Congress is presently considering the FCC report and proposed amend-

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[27] FCC Report *In the Matter of Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Services*, 67 Rad. Reg. 2d (P&F) 1771 (1990).

ments to the Cable Act. It is clear, as the FCC has recently found, that the industry itself is in a state of transition and Congress may well determine that it is time to legislatively alter the relationships between the participants in that industry. In this context, it is again respectfully suggested that the rule of law requested of the Court by Warner in its petition would be both premature and unwarranted.

CONCLUSION

Wherefore, for the reasons stated above, the petition for a writ of certiorari should be denied.

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APPENDIX

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APPENDIX

SELECTED PORTIONS OF THE RECORD BELOW

TESTIMONY OF HARRY F. SHERAW LOCAL GENERAL MANAGER OF WARNER CABLE COMMUNICATIONS INC.

Q. As you provide service to Sandestin, do you have any competition at Sandestin?

A. Yes, we do.

Q. Who is that competition with?

A. Currently Essex, previously Skycomm.

Q. Is it a situation where both companies are offering cable services to the resort?

A. Yes.

Q. Do you have dual lines running in?

A. In some areas yes; in some areas no.

Q. What kind of areas would you have dual line, the outlying residential complex or the high-rise?

A. Probably it's easier to answer the reverse of that. Where we currently had existing lines, Skycomm overbuilt us. In some areas where they added additional new development or something like that the resort did not allow us to go forward and rewire in that area and only allowed Skycomm to wire in that area. So in some of the new development areas, at that time Skycomm was the only choice.

. . .

Q. Have you engaged in any rate competition with Skycomm or Essex to your knowledge?

A. Yes, we have.

Q. Has it developed into what you might call a rate war?

A. We have had to reduce our rates approximately 50%.

Q. Do you—how many customers do you have at Sandestin—subscribers, I guess?

A. I think in Sandestin Beach Resort, we have somewhere in the neighborhood of 200 to 300. We at one point in time had close to 1,000.

Q. Do you attribute your diminishment from 1,000 to the 200 to 300 area to competition with another supplier?

A. Yes.

. . .

Q. Does Warner presently have any plans to pull out of Sandestin?

A. No, we do not.

. . .

Q. . . . Is Sandestin part of your rebuild?

A. Yes.

Q. Has it been completed—the rebuild in Sandestin?

A. Yes.

(October 13, 1986; Dep. Tr. 50-53.)

* * * *

Q. Would you say that based on what you know and have read and have heard about in the industry, that the Niceville situation as it exists today is unique?

A. In that a municipal entity is going to overbuild a private enterprise, yes, I would say that is unique.

(October 13, 1986; Dep. Tr. 82.)

* * * *

Q. Would you also say that the Valparaiso cable system, insofar as it provides this two-way capability for home-safety purposes—and let's put aside the pumps and the wells and all of that, and the lift stations—but just in terms of home security, fire, and medical alert, that it is rare?

A. There certainly are substantially less cable operators, be they private or municipal, that are providing bi-directional two-way services.

Q. But we do know—or you do know, do you not, that the technology exists for that. Obviously it exists if Valparaiso is doing it.

A. Actually Warner Cable was the individuals who founded bi-directional systems. A gentleman by the name of Chief Scientist Jim Fischer developed it.

. . .

Q. He then was correct when he made the statement that it was Warner who developed this bi-directional technology as you've just described?

A. To my understanding, yes.

. . .

Q. Was Columbus [Ohio] like a test community for the Qube system?

A. Yes, it was.

Q. Was the Qube system ever actually used at any other locations?

A. Yes, Cincinnati, Ohio; Houston, Texas; Dallas, Texas; and Pittsburgh, Pennsylvania.

. . .

Q. What has happened with the Qube capability, vis-a-vis Warner's use of it since the late 70's?

A. The capability is still there. What I'm familiar with is what we refer to as de-Qubed—they have been de-Qubed.

Q. What do you mean by that?

A. The revenue streams did not materialize to cover the cost, and it became a subsequent hinderance. In the research and development stage of it, it became apparent —I will say to the people developing that product, because I did not look at the numbers or anything—that it was too much of an investment and too much of a monthly draw-down or cost factor involved to sustain the ongoing nature of it.

Q. Warner found that it was an expense item that wouldn't carry itself?

A. Correct.

Q. Did Warner also find that it was an expense item that couldn't make a profit?

A. My understanding is that is correct.

(October 13, 1986; Dep. Tr. 82-86.)

* * * *

Q. In the Niceville area to the extent that it has been completed, to the extent that customers have converted over, they are being offered under the new system a potential of 31 basic channels plus up to 4 premium pays. Is that right?

A. Correct.

Q. Is there any pay-per-view being offered right now?

A. No.

(October 13, 1986; Dep. Tr. 106.)

* * * *

Q. Does your upgraded system have a maximum channel capacity above which you couldn't go if you wanted to?

A. It is designed today to go to 52 channels, and in today's technology, I believe that's as far as you could go . . .

Q. And of those 52, you're currently using 35?

A. Correct.

Q. That's 17 extras that are there?

A. Correct.

(October 13, 1986; Dep. Tr. 125.)

* * * *

Q. Now, you also didn't think it was fair for people to point to their neighbors in Valparaiso, who were getting at that time more programming at a substantially lower cost. Is that the point you're trying to make?

A. I wouldn't say it's not fair. If I was a customer out there and, I was paying Warner $10 for 11 channels

and saw somebody in Valparaiso getting 20-plus for $7, I would not be happy either.

(October 13, 1986; Dep. Tr. 149.)

* * * *

Q. . . . Let me wrap up then with giving you, under April, '86, the example of an apartment where I have one outlet in my living room and one outlet in my bedroom, and I want HBO and The Movie Channel. In other words, I want everything that you offer. What do I have to pay?

. . .

A. I added $9.09 for basic; I would have added in $2 for an additional outlet, and I would have added in $12.95 for HBO, plus $12.95 for The Movie Channel, plus 50 cents for the HBO at your additional outlet. It comes up to $37.49.

(October 13, 1986; Dep. Tr. 154-155.)

* * * *

Q. Am I correct in assuming that there's more programming available from the satellites in the sky than are being offered by Warner today?

A. Yes, you are correct.

(October 13, 1986; Dep. Tr. 157.)

* * * *

Q. All right. Are your programming decisions locally made, regionally or nationally made, or some combination?

A. It's a combination. I present my views to our marketing department, to our operations department, to our engineering department. We review the expectations of what will happen, and generally based upon that input, a decision is made by the operations people in our corporate offices.

Q. Where's that located?

A. Columbus, Ohio.

(October 13, 1986; Dep. Tr. 168-169.)

TESTIMONY OF GARY BROWN
MEMBER OF NICEVILLE CITY COUNCIL

Q. Well, let's see if we can understand—as late as October 9, 1984, Cosmic had been granted the franchise. Isn't that correct?

A. Uh-huh.

Q. And was there anything else that had happened after October of 1984 and February of '85 concerning TV cable services in the City of Niceville?

A. I don't think I quite understand the question.

Q. Well, first you had only one system.

A. Uh-huh.

Q. In October you decided that there would be two private companies—

A. We still have one system.

Q. Right, but you had just granted this one very recently. In fact, it's indicated on document 111, the acceptance was not until October 22, 1984, that Cosmic had accepted it then.

A. Uh-huh.

. . .

Q. —the City's position in entering into a bond obligation for the building of TV cable?

A. We weren't discussing entering into a bond obligation. I think we asked Mr. Fray—these were simply long-term plans. There's two things I was going to mention. One thing—one answer to your question is that nothing happened. We had not heard from Cosmic. We had no reason to believe that things were proceeding. The second thing that happened in December of '85 as we talked about before, the Cable Communication Act of 1984 was passed by Congress, which specifically granted the right to cities to own their own cable system, in some cases in competition with a private operator, was the interpretation that I had received of the Act. So this was the second reason for possibility downroad, and a long-term plan of, perhaps, considering the financing of a cable television system.

(September 9, 1986; Dep. Tr. 102-103.)

EXCERPT OF BRIEF OF THE APPELLATE
WARNER CABLE COMMUNICATIONS INC. v.
CITY OF NICEVILLE
NO. 89-3273
ON APPEAL, FROM THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA

City Councilman Brown, for example, admitted at trial that if action by the City were required for the preservation of its municipally owned cable system in the competitive market, he would act as a regulator to the detriment of Warner ("I would have to fight for the [City's] system if that's what you're asking") to protect the citizens from tax increases or from reductions in municipal services.

(Brief of the Appellate, pp. 30-31.)

EXCERPTS FROM FCC REPORT, IN THE MATTER OF COMPETITION, RATE DEREGULATION AND THE COMMISSION'S POLICIES RELATING TO THE PROVISION OF CABLE TELEVISION SERVICE, JULY 31, 1990

Responding to that statutory mandate, this *Report* finds that the six years since enactment of the Cable Act—and particularly the three and one-half years since widespread rate deregulation began thereunder—have witnessed a significant and ongoing transformation of the video marketplace. The Cable Act sought cable industry growth, and the number of communities and homes served by cable has increased significantly. The Cable Act sought cable industry development, and cable has further developed its multichannel services beyond retransmission, changing the expectations of most Americans about television viewing options. The Cable Act also sought competition to cable operators, however, and the competition within the video industry is just beginning to expand and include alternative multichannel providers. Thus, the cable industry, and the newer alternative multichannel video providers beginning to compete with cable, are still evolving.

(Report, p. 5.)

* * * *

Our undertaking of this *Report* thus coincides with a growing sense, among various interested parties, subscribers and their legislators, that the time is ripe to review both the progress of the cable industry and the legal framework under which it operates.

(Report, p. 8.)

* * * *

The facts that cable operators possess varying degrees of market power does not mean that other delivery media do not compete with cable. Broadcast television and video cassette rentals provide substitute uses for some, but not all, of the services offered by cable, and

thus constrain the behavior of cable operators to some extent. Moreover the degree of competition confronting cable is expected to increase over time. Rivals such as SMATV, MMDS, home satellite dishes (HSDs), and second cable systems will probably expand their coverage, and DBS service may begin to have a significant impact in four or five years. Hence, we will focus our recommendation and actions in this area on encouraging rival multichannel video providers to enter the market and on invigorating the existing competition to cable as soon as possible.

(Report p. 33.)

* * * *

Information on current basic cable rates in markets served by more than one competing cable system is available, both in the record and in from FCC staff research. These sources indicate that, where cable systems compete head-to-head, per channel rates for basic service are generally significantly lower than the national average. . . .

(Report p. 41.)

* * * *

The number of directly competitive second cable systems is relatively small, with commentators reporting 40 to 49 directly competitive systems currently in operation. Approximately two-thirds of these systems have overlap areas of 50% or more. The relative paucity of successful competitive cable systems to date has been variously attributed to a lack of interest by cable operators (due to less attractive economics), to restrictive requirements by franchising authorities (*e.g.*, universal service requirements), and to what has been called predatory activity by incumbents as well as other advantages of incumbency. In those cases where second cable systems exist, the direct competition has resulted in reduced per channel rates for cable service.

(Report, pp. 52-53.)

* * * *

This *Report* finds that robust competition in the video marketplace has not yet developed but is emerging. In light of the developing field of existing and potential multichannel competitors to cable, and evidence that even direct competition between cable operators may increasingly occur, we do not recommend any drastic or long-term reregulation of cable rates and services. Therefore, the proposed actions and recommendations to Congress set forth in this *Report* are designed to eliminate market restraints and enhance the prospect for competition rather than to reregulate the cable industry. Consequently, they are targeted and limited and should become largely unnecessary once full-fledged multichannel competition develops.

(Report, p. 100.)

TEXT OF FLORIDA STATUTE 166.046 (1989)

166.046 Definitions; minimum standards for cable television franchises imposed upon counties and municipalities.—

(1) As used in this section, the term:

(a) "Cable service" means:

1. The one-way transmission to subscribers of video programming or other programming service; and

2. Subscriber interaction, if any, which is required for the selection of such video programming or other programming service.

(b) "Cable system" means a facility, consisting of set of closed transmission paths and associated signal generation, reception, and control equipment that is designated to provide cable service which includes video programming and which is provided to multiple subscribers within a community, but such term does not include:

1. A facility that services only to retransmit the television signals of one or more television broadcast stations;

2. A facility that serves only subscribers in one or more multiple-unit dwellings under common ownership, control, or management, unless such facility or facilities use any public right-of-way;

3. A facility of a common carrier, execept that such facility shall be considered a cable system to the extent such facility is used in the transmission of video programming directly to subscribers; or

4. Any facilities of any electric utility used solely for operating its electric utility systems.

(c) "Franchise" means an initial authorization or renewal thereof issued by a franchising authority, whether such authorization is designated as a franchise, permit, license, resolution, contract, certificate, agreement, or otherwise, which authorizes the construction or operation of a cable system.

(d) "Franchising authority" means any governmental entity empowered by federal, state, or local law to grant a franchise.

(e) "Person" means an individual, partnership, association, joint stock company, trust, corporation, or governmental entity.

(f) "Video programming" means programming provided by, or generally considered comparable to programming provided by, a television broadcast station or cable system.

(2) No municipality or county shall grant a franchise for cable service to a cable system within its jurisdiction without first, at a duly noticed public hearing, having considered:

(a) The economic impact upon private property within the franchise area;

(b) The public need for such franchise, if any;

(c) The capacity of public rights-of-way to accommodate the cable system;

(d) The present and future use of the public rights-of-way to be used by the cable system;

(e) The potential disruption of existing users of the public rights-of-way to be used by the cable system and the resultant inconvenience which may occur to the public;

(f) The financial ability of the franchise applicant to perform;

(g) Other societal interests as are generally considered in cable television franchising;

(h) Such other additional matters, both procedural and substantive, as the municipality or county may, in its sole discretion, determine to be relevant.

(3) No municipality or county shall grant any overlapping franchises for cable service within its jurisdiction on terms or conditions more favorable or less burdensome than those in any existing franchise within such municipality or county.

(4) The provisions of subsection (3) shall not apply when the area in which the overlapping franchise is being sought is not actually being served by any existing cable service provider holding a franchise for such area. The provisions of subsection (2) shall apply to the provisions of this subsection and subsection (5). As used in this subsection, the term "actually being served" means that cable service is actually available to subscribers to such extent that the only act remaining in order to provide cable service is the physical connection to the individual subscriber location as of 15 days prior to any subsequent application for a franchise.

(5) Nothing in this section shall be construed to prevent any municipality or county considering the approval of an additional cable service franchise in all or any part of the area of such municipality or county for imposing additional terms and conditions upon the granting of such franchise as such municipality or county shall in its sole discretion deem necessary or appropriate.

(6) All cable service franchises in existence as of October 1, 1987, shall remain in full force and effect according to their terms.

No. 90-1463

Supreme Court, U.S.
FILED
JUN 4 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

WARNER CABLE COMMUNICATIONS INC.,

Petitioner,

—v.—

CITY OF NICEVILLE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITIONER'S REPLY BRIEF

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Cable Communications Policy Act of 1984, 47 U.S.C. § 533 (Supp. V 1987) 9

PRELIMINARY STATEMENT

Respondent makes no effort to deal with the constitutional principles for granting certiorari presented by Warner. It implicitly admits the Eleventh Circuit's constitutional theories are erroneous. Respondent's opposition resembles a plea of confession and avoidance. While the confession is fully warranted, the avoidance fails because it rests on factual allegations that were never tried.

Warner was denied a trial on First Amendment issues because the Eleventh Circuit seriously eroded well-established guarantees of free speech and press. The court below held that intentional destruction of private cable speakers by a government that wishes to be the only speaker in the community does not raise First Amendment concerns. But when government elects to silence a speaker through predatory competition and misuse of sovereign advantages, there are indeed First Amendment concerns. This Court's *Preferred* decision[1] requires that Warner be afforded a trial to develop the First Amendment issues in a concrete factual setting.

That is the gravamen of Warner's petition. Niceville ignores these constitutional issues; it fails even to discuss them. Instead, the City argues the facts *as if* there had been a trial. The City repeatedly argues its good intentions, the possibility that Warner may survive, and other matters as if these were facts found at trial.

The Eleventh Circuit was clearly wrong in its basic constitutional theory that "Warner fails to assert a protected first amendment interest *even* if the projected City-owned system will *surely* render Warner's continued operation in Niceville economically infeasible." (Pet. App. 5a; emphasis added). The City does not try to defend that radical proposition. Rather, it argues as if there had been factual findings that the City will not use predatory tactics and that Warner may possibly survive. Niceville's inability to defend the appellate court's constitutional theories is a concession they are indefensible under First Amendment jurisprudence. If the govern-

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1 *City of Los Angeles* v. *Preferred Communications, Inc.*, 476 U.S. 488 (1986).

ment can make itself the sole speaker in a community by exploiting its taxing and other economic powers rather than by a statutory prior restraint, then the First Amendment is reduced to an empty formality.

Warner demonstrated that the intentional infliction of economic loss by governmental action does raise First Amendment concerns. (Pet. 15). Warner further demonstrated that discriminatory taxation targeted at an individual speaker also violates the First Amendment. (Pet. 15-16).[2] Each of those constitutional propositions is incontestable. Neither is addressed by the City.

The importance of a trial to frame the First Amendment issues is clear. Cable now represents a major and growing source of news, information and entertainment. The type of threat faced by Warner in Niceville is becoming nationwide. The *amici* briefs in support of Warner's petition—filed on behalf of the nation's thousands of cable television systems serving approximately 60 million subscribers—demonstrate the urgency for review by this Court. *Amici* demonstrate that the threat to free speech in Niceville, contrary to respondent's assertion (Br. 19-20), is not an isolated phenomenon but is characteristic of a growing threat to cable speakers nationwide. At least 84 municipalities are threatening to overbuild private cable systems—an eight-fold increase in just two years. (Pet. 12 n.11).[3]

The *amici* demonstrate that the Eleventh Circuit's radical surgery on the First Amendment, unless corrected, will give *carte blanche* to local political officials that wish to displace private cable speakers with a government-controlled press.

This is a landmark First Amendment case. The ruling of the court below will undermine cable's growing role in providing local news, information, public affairs programs, and commentary on the local political process. In some communities, as *amici* point out, cable is the only local video medium. This Court should decide whether Warner's allegations of

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2 The rationale in *Leathers* v. *Medlock*, 59 U.S.L.W. 4281 (April 16, 1991) reaffirms that principle.

3 These figures are not challenged by the City. (Br. 20).

intentional governmental efforts to silence its voice through predatory economic tactics and targeted discriminatory taxation entitle Warner to a trial. There is no basis for respondent's suggestion that a decision should be delayed until Warner's capacity to exercise its First Amendment rights has been destroyed.

I. A GOVERNMENT'S PREDATORY ECONOMIC COMPETITION AND TARGETED DISCRIMINATORY TAXATION, DESIGNED TO DESTROY A PRIVATE SPEAKER SO THAT ONLY THE GOVERNMENT MAY SPEAK, THREATEN FIRST AMENDMENT RIGHTS

Under *Preferred* and *Leathers* v. *Medlock*, 59 U.S.L.W. 4281 (April 16, 1991), cable speakers are clearly entitled to First Amendment protection. The Eleventh Circuit, however, has limited such protection to the vanishing point by ruling that government is free to destroy a cable speaker, and take over as the sole speaker, so long as it uses subsidized below-cost pricing and targeted discriminatory taxation rather than an outright statutory ban: "Warner fails to assert a protected first amendment interest *even* if the projected City-owned system will *surely* render Warner's continued operations in Niceville economically infeasible."

That startling principle was laid down in the face of Warner's allegations that Niceville intended to drive it from the market, to use predatory and tax-subsidized competition and discriminatory taxes and regulations, and to become the sole video speaker in the community. The court of appeals' holding is not, and cannot be, the law of the First Amendment.

To this Niceville replies—because it refuses to try to defend the court's draconian legal theory—"Warner's potential demise in the face of competition would not at all be the certainty which it predicts in its petition." (Br. 6). That is speculation about an untried allegation. A petition for certiorari is no place to argue the facts; a trial is. Moreover, contrary to the City's conjecture, the Eleventh Circuit assumed Warner's certain demise ("even if the City-owned system will *surely* render Warner's continued operations in Niceville economi-

cally infeasible") but nonetheless found no First Amendment issues. That is clear constitutional error.[4]

The City, significantly, does not challenge the following facts set forth in Warner's petition (6-7, 20): that Niceville's below-cost pricing strategy, which it predicts will capture 75% of Warner's subscribers in the first year alone, will be subsidized by general municipal tax revenues;[5] that the City's $2,000,000 construction bonds will be backed by tax revenues and issued at rates unavailable to private parties; that the City's system will be immune from the franchise fees and other taxes that Niceville will continue to impose on Warner;[6] or that the City's broad discretionary regulatory powers over Warner's business allow it to drive up Warner's costs of operation. That is quite a list of non-denials.

Niceville, not denying those critical facts, argues there is no iron-clad proof that it has a predatory "intent" despite its subsidized below-cost prices. But the power to destroy Warner's system is undeniable and there is already evidence of the purpose. Niceville cannot explain away the predatory remarks by the Chairman of its Cable Committee.[7]

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4 Nor does Niceville try to defend the appellate court's theory that a government would violate the First Amendment if it *physically* drowned out a speaker, but is free to destroy the speaker with predatory and discriminatory *economic* weapons. (Pet. App. 8a-9a). In declining to discuss that constitutional theory, Niceville chooses wisely, because the distinction between *physical* and *economic* drowning out lacks any First Amendment significance.

5 Niceville's reference (Br. 6) to a temporary decline in Warner's subscribers in the nearby Sandestin resort community as a result of an overbuild is irrelevant. Warner there competes on a level playing field against a private cable system, not a government with special taxing and other sovereign powers, and has recaptured most of its subscribers.

6 *Leathers* condemns such discriminatory taxation aimed at a single competitor in the same medium—especially where, as here, there is concrete evidence of censorial intent (*see* Pet. 5, 22-23; *infra* p. 7).

7 Contrary to Niceville's claim (Br. 8 n.12), Cable Chairman Brown, in boasting "there is not gonna be a competitive system in Niceville," was referring to the City's impact on Warner, as shown by the City Council's minutes. (Pet. App. 75a). Cosmic did not surrender its franchise until three

Although advancing its own (untested) protestations of purity, Niceville concedes that municipal overbuild threats can be used by local political officials "as a franchise renewal negotiation tactic" or "to extract franchise concessions from a private cable operator which would otherwise be prohibited by the 1984 Cable Act" (Br. 20). Such ominous threats will chill First Amendment speakers. As this Court recently declared in *Leathers*, when a "scheme appeared to have such potential for abuse . . . we concluded it violated the First Amendment." 59 U.S.L.W. at 4283.

II. A GOVERNMENT SPEAKER MAY NOT COMPETE WITH A PRIVATE SPEAKER IN A MARKET WHERE ONLY ONE CAN SURVIVE

Quite aside from the question whether government may use economic coercion to stamp out private speech, there is the additional question whether government may compete, even on fair terms, where a community can sustain only one cable speaker. Warner thinks not. (*See* Pet. 16-18). Where only one speaker is possible, the government may not be that speaker. Tellingly, Niceville is also silent on this First Amendment principle.

Warner was denied a trial on the question of whether Niceville is, in fact, the type of community that can sustain only one system. The parties disagreed on that question, and the district court found this created a factual issue. (Pet. App. 42a). Yet the Eleventh Circuit simply assumed that

---

months after Chairman Brown's remarks; and Brown conceded that at the time of his remarks he knew nothing of Cosmic's plans under its new cable franchise. (Supp. App. 1a).

Neither can the City explain away Chairman Brown's remark that "the big hammer of the franchise was originally rate control; if you're controlling somebody's money you are controlling them." (Br. 8 n.12). Warner alleges that Niceville still possesses the power to regulate rates (Pet. 6)—a disputed factual issue that should have been resolved at trial. (Pet. 6 n.7).

Moreover, the City does not seek to explain away Chairman Brown's admission that the City would use its regulatory powers to disadvantage Warner (Pet. App. 79a).

Niceville could sustain multiple systems. Niceville now merely repeats that assumption.

If only one cable system can survive in Niceville, and should the survivor be the City's subsidized system, there will be no private video speaker in the City to comment on local government and politics and other issues of community concern. Niceville does not challenge that fact. Nor does it question cable's growing role in reporting on local news and public affairs.[8] Niceville's acquiescence once more emphasizes the need for plenary review of the important First Amendment issues raised by this case. As this Court declared in *Leathers*, "the press plays a unique role as a check on government abuse." 59 U.S.L.W. at 4283.

III. NICEVILLE'S BRIEF RELIES UPON UNPROVEN FACTS AND THUS DEMONSTRATES THE ELEVENTH CIRCUIT'S ERROR IN DENYING WARNER THE TRIAL REQUIRED BY *PREFERRED* AND THE FIRST AMENDMENT

Niceville argues its case on the merits, as if there had been a trial. There was no trial because the Eleventh Circuit concluded that no set of facts could show an infringement of Warner's First Amendment rights. By arguing its own untried version of the facts, Niceville concedes that it is essential to a First Amendment analysis to know the facts, and, therefore, in effect concedes that a trial was necessary. Warner's Petition (18-25) demonstrates that it is entitled to a trial on the following First Amendment issues:

1. *Will the government exploit its sovereign powers and use predatory tactics to drive Warner from the community*? The district court found that this was an issue for trial, but the Eleventh Circuit avoided the question by holding that nothing Niceville might do could conceivably infringe Warner's rights. If that revolutionary proposition differs from the law laid down by this Court, and we submit it does, then Warner is entitled to a trial.

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8 *Amici*'s briefs provide substantial data on the growing role of cable as an electronic publisher of local news, public affairs programs and commentary on the local political process.

2. *Can the Niceville market sustain more than one cable speaker*? The district court found this was a factual question for trial. The Eleventh Circuit, however, merely assumed the market could sustain multiple cable speakers (*see* Pet. App. 7a). Niceville now asks this Court to make the same assumption (Br. 6, 11). That is not a legitimate method of denying Warner its day in court.

3. *Was Niceville motivated to suppress Warner's speech because of objections to its editorial judgments*? The summary judgment record suggests that Niceville was motivated, at least in part, by objections to Warner's editorial judgments. It objected to Warner's dropping the Jim and Tammy Bakker religious network and was also moved to act by its inaccurate belief that all program decisions were made by New York City executives. In light of this factual record, there was certainly no basis for the Eleventh Circuit's assumption that Niceville did not "target" Warner's speech. (Pet. App. 5a n.4).[9]

Niceville now asks this Court to follow the Eleventh Circuit by accepting its untried assertion that objections to Warner's editorial judgments played no part in the City's decision to launch its own cable system (Br. 15).[10] This issue raises serious First Amendment concerns. Government action is "unconstitutionally suspect when it threatens to suppress the expression of particular ideas or viewpoints." *Leathers*, 59 U.S.L.W. at 4283. The question of the City's motives is a matter for trial; for proof, not faith.

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9 The district court, in contrast, observed that Warner might be able to prove that its " 'voice' was targeted for suppression by the City." (Pet. App. 44a).

10 Niceville claims it objected to the deletion of the Bakkers' religious network several years before passing the municipal cable ordinance and that its objection "was resolved at that time" (Br. 5 n.5). The City's objection was never "resolved"; Warner did not restore that religious network and the City officials' grievances continued unabated. When the City decided to establish a cable system, the Jim and Tammy Bakker network was one of the very first it signed up (Pet. App. 84a-85a); and the local political officials agreed to carry this religious network for at least three years (Pet. App. 86a-87a). Contrary to respondent's claim (Br. 9-10), Warner did protest the City's programming objections below (*see* Supp. App. 1a-2a).

4. *Can the City make the showing required by the First Amendment's strict test*? Niceville, as shown in the Petition (24-25), must demonstrate (a) a compelling state interest in supplanting the only private cable speaker with a government-controlled speaker, and (b) that the means chosen to achieve its goals are the least restrictive means available. Warner was entitled to a trial on these issues under *Preferred* and the First Amendment. But the Eleventh Circuit concluded "we need apply no balancing test to the City's action." (Pet. App. 11a).

Niceville, once again, does not try to defend the Eleventh Circuit's constitutional analysis. On the contrary, it *sub silentio* concedes this was constitutional error because it repeatedly argues it had substantial reasons for launching a municipal cable system (Br. 2-7, 11)—*i.e.*, better programs, better service, lower subsidized prices, and two-way alarm and other bi-directional services. Warner was entitled to a trial to demonstrate that there were not compelling, or even important, interests for Niceville's predatory action.

Warner was also entitled to a trial to prove that Niceville could have achieved its alleged goals of better programs and services without suppressing private cable speech (*e.g.*, by encouraging Cosmic or other cable systems to enter the cable field). The City's own expert conceded that many of Niceville's goals were infeasible or could be achieved without displacing private speakers. (Pet. App. 91a-92a).

Preferred entitles Warner to a trial on all the foregoing issues. Niceville cannot argue facts the Eleventh Circuit would not allow to be tried.

IV. THE CABLE ACT DOES NOT IMMUNIZE NICEVILLE'S FIRST AMENDMENT VIOLATIONS

Niceville, noting the Cable Act allows municipal ownership, implies this somehow immunizes its First Amendment violations. (Br. 6-19). That is a frivolous argument. The Act does not bless unfair and predatory municipal competition that will displace an existing private cable speaker and force a new entrant (Cosmic) to tear up its franchise. Congress had no intention of authorizing such predatory conduct antitheti-

cal to the First Amendment; the Act was passed, in large part, to protect cable systems from unfair conduct by local political officials and to encourage cable's growth.

The snippet of legislative history cited by Niceville (Br. 17 n.22) shows that Congress assumed that cities would engage in normal "profitable" activities in the cable field, not below-cost predatory pricing subsidized by raising taxes.[11]

V. THE CONSTITUTIONAL ISSUE IS RIPE

Although the Eleventh Circuit laid down drastic First Amendment principles that will adversely affect Warner, that have driven away a new private entrant (Cosmic) and that threaten the entire cable industry—radical constitutional principles that Niceville does not even try to defend—the City nevertheless suggests that certiorari should be denied because the constitutional concerns are "premature." (Br. 22; *see also* 19-21). But the Eleventh Circuit, disagreeing with the district court, correctly held the constitutional issues were ripe. Warner need not wait until its free speech rights are totally suppressed before suing.[12]

The Eleventh Circuit's opinion involves an imminent threat to Warner and to hundreds of other private cable speakers across the nation. Niceville concedes there are at least 84 threatened municipal overbuilds (Br. 19-20)—an eight-fold increase in two years (Pet. 12 n.11). As shown by the *amici*

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11 Congress was sensitive about First Amendment hazards of municipal ownership. It provided that programming decisions should be made by an independent entity created by the local franchising authorities. (47 U.S.C. § 533(e)). Niceville violated even this minimal constitutional safeguard. The local politicians selected 19 program services—the bulk of its schedule—before going through the ritual of appointing their friends to a program board. (Pet. 5a n.6).

12 Niceville concedes it has taken concrete steps to launch its cable system (Br. 2). It has also entered into three-year contracts with program suppliers for the bulk of its schedule. (Pet. App. 83a-85a). Niceville is poised to proceed with its bond issue as soon as litigation is resolved.

briefs on behalf of the nation's cable speakers, a trial to develop First Amendment ground rules is essential.[13]

The Eleventh Circuit's opinion is a radical and disturbing departure from time-honored First Amendment values. It should be reviewed now.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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13 There is no merit to respondent's suggestion that the Court should defer acting because the electronic media are undergoing "transition" and technologies now "in their infancy" may someday supersede cable (Br. 21-22). The sacrifice of Warner's First Amendment rights cannot be justified by speculation about possible "transitions" and future technological developments. The current state of development of cable technology (the huge capital investment required to build and upgrade cable systems and launch new program services) requires clear constitutional guidelines now.

SUPPLEMENTAL APPENDIX

TESTIMONY OF GARY BROWN MEMBER OF NICEVILLE CITY COUNCIL AND CHAIRMAN OF CABLE TELEVISION COMMITTEE

Q. To your knowledge, was Cosmic given any time frame in which they must construct their competing system with Warner?

A. I don't recall a specific time frame, no.

Q. To you knowledge, and in your capacity as sitting on the cable committee, had you inquired of Cosmic between October of 1984, and February of '85, about their progress?

A. I don't recall asking Cosmic directly as to what their progress was.

Q. If you didn't ask them, did they come and volunteer to you?

A. I don't recall any information as to their progress at that time.

(Sept. 9, 1986; Dep. Tr. 103-104).

PLAINTIFF'S RESPONSE TO DEFENDANTS' STATEMENT OF UNCONTESTED MATERIAL FACTS AND PLAINTIFF'S STATEMENT OF FACTS IN RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

In the past, the City has asserted pressure on Warner in an effort to control programming of channels offered on basic service. (p. 3).

* * *

39. Admitted, but more specifically, the complaints that Mrs. Edge received from Warner's subscribers pertained to periodic cable service outages and lack of some programming that the subscribers desired. (Depos. of Jessie Edge, October 7, 1986 at 7-8.) (p. 14).*

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* *See* Pet. App. 80a-81a quoting Councilmember Edge's complaints about religious programming.

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---

MOTION FOR LEAVE TO FILE A BRIEF AMICI CURIAE

Pursuant to Rule 37.2 of the Supreme Court Rules, Amici Curiae The Florida Cable Television Association ("FCTA"), Jones Intercable, Inc. ("Jones Intercable"), The Kentucky Cable Television Association ("KCTA"), The Michigan Cable Television Association ("MCTA"), The Ohio Cable Television Association ("OCTA") and The Pennsylvania Cable Television Association ("PCTA") hereby move this Court for leave to file a Brief Amici Curiae in support of petitioner Warner Cable Communications Inc. ("Warner Cable"). This motion is necessary because one of the parties, the City of Niceville, has refused to provide these *amici* with written consent to file a Brief Amici Curiae.

FCTA, KCTA, MCTA, OCTA and PCTA are all trade associations that represent owners and/or operators of cable television systems within their respective states, which combined serve approximately 10.6 million subscribers. Jones Intercable is a Colorado corporation that owns and operates approximately 60 cable television systems throughout the United States.

The issues raised by Warner Cable's petition are of great concern to FCTA, KCTA, MCTA, OCTA, PCTA and Jones Intercable, and these *amici* support Warner Cable's petition for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit.

Despite a formal request by counsel for these *amici* to obtain written consent from Warner Cable and the City of Niceville, and despite Warner Cable giving its written consent, the City of Niceville has formally refused to give written consent to these *amici* to file a Brief Amici Curiae.

WHEREFORE, FCTA, KCTA, MCTA, OCTA, PCTA and Jones Intercable respectfully request that this Court allow them to file a Brief Amici Curiae in support of Warner Cable's petition.

Respectfully submitted,

/s/ R. Bruce Beckner

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INTEREST OF AMICI

The Florida Cable Television Association ("FCTA") is a trade association representing 50 owners or operators of 190 cable systems in the State of Florida serving approx-

imately 3.2 million subscribers. The case before the Court concerns a privately-owned cable system in Florida that is threatened with destruction at the hands of a municipal government that proposes not only to compete with that system through predatory means but also to regulate it economically as well.

Jones Intercable, Inc. ("Jones Intercable") is a Colorado corporation that owns and operates approximately 60 cable television systems throughout the United States. It operates systems in large metropolitan areas as well as in small cities and towns and has two cable television systems presently threatened with a municipal overbuild.

The Kentucky Cable Television Association ("KTCA") is a trade association that represents 47 companies that own or operate 143 cable television systems in the State of Kentucky, serving approximately 661,655 subscribers. In addition, there are nine actual or threatened "overbuilds" of privately owned cable television systems in the State of Kentucky.[1]

The Michigan Cable Television Association ("MCTA") is a trade association that represents 32 companies that own or operate 276 cable television systems in the State of Michigan, serving approximately 1.6 million subscribers. Five privately-owned cable television systems in Michigan are actually overbuilt or have been threatened with a municipal overbuild.

The Ohio Cable Television Association ("OCTA") is a trade association that represents 49 cable television operators in the State of Ohio who own or operate 314 cable systems serving a total of approximately 2.5 million subscribers. Two privately-owned cable television systems in

[1] "Overbuild" is the generally accepted term in the cable television industry that refers to a situation where two cable systems exist side-by-side and compete with each other on a customer-by-customer basis.

Ohio are actually overbuilt or have been threatened with a municipal overbuild.

The Pennsylvania Cable Television Association ("PCTA") is a trade association that represents 77 companies that own or operate 171 cable television systems in the Commonwealth of Pennsylvania, serving approximately 2.6 million subscribers. One privately-owned cable television system in Pennsylvania is threatened with a municipal overbuild.

The petition of Warner Cable Communications Inc. ("Warner Cable") asks the Court to determine the constitutionality of a local government's operation of a cable television system in predatory (*i.e.* tax-subsidized, below-cost) competition with an existing privately-owned cable operator when the necessary outcome of that competition will be the silencing of the only locally-based First Amendment speaker. The ability of a municipal government to over-build, economically regulate and unfairly compete with a private company in the cable television industry is an issue of great concern to FCTA, Jones Intercable, KCTA, MCTA, OCTA and PCTA. These *amici* support Warner Cable's petition for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit.

REASONS FOR GRANTING THE PETITION

The question before the Court is whether a municipality can destroy the only locally-based media outlet (in this case the local cable television operator) through a combination of predatory competition and economic regulation without violating the First Amendment. The Eleventh Circuit held that a municipality could take such action with impunity; the destruction of the cable television company by these means was not "First Amendment injury," the Court of Appeals said. *Warner Cable Communications Inc. v. City of Niceville*, 911 F.2d 634, 637-38 (11th Cir. 1990), *petition for cert. filed*, 59 U.S.L.W. 3674 (U.S. March 15, 1991)

(No. 90-1463). This is error. The replacement of the *only* privately-owned mass medium speaker in a community by a government speaker cannot be a matter of indifference under the First Amendment.

The Court of Appeals turned a deaf ear to Warner Cable's claim that the City, by virtue of its status as a governmental unit, possessed so many competitive advantages that a competing municipally-owned cable system threatened Warner Cable's very existence in Niceville, not just the amount of Warner Cable's profits. *Id.* at 638. Although the District Court held that Warner Cable's argument was premature—the threatened destruction not having taken place—the Eleventh Circuit would not have allowed Warner Cable to offer its proof even after the company's demise in Niceville. There being no direct governmental restraint on Warner Cable's speech, the Eleventh Circuit refused to find that the First Amendment shielded Warner Cable from the consequences of the City's predatory competition and economic regulation. *Id.* at 640. In essence, the Eleventh Circuit held that Warner Cable had not stated a claim for relief under the First Amendment.[2] Warner Cable was not permitted a trial to show

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[2] The Eleventh Circuit opinion repeatedly seeks to minimize the nature of the injury to Warner Cable, characterizing it as the loss "of Warner's profitable position as the only speaker in a captive cable market." *Id.* at 638. It is totally inappropriate for an appellate court to make such factual conclusions in the absence of a full trial record. The Eleventh Circuit's holding is not based on a failure of proof by Warner; it is based on a failure to state a claim for which relief can be granted. *Id.* at 636. As such, the courts are required to assume the truth of the factual matters alleged. *See Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969) ("For the purposes of a motion to dismiss, the material allegations of the complaint are taken as admitted . . . And, the complaint is to be liberally construed in favor of plaintiff." (citations omitted)); *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) (The complaint should not be dismissed unless it appears that appellant could "prove no set of facts in support of his claim which would entitle him to relief.").

the nature of the City's predatory competition, nor the inevitable effect of that competition on any privately-owned cable operator, including Warner Cable.

The Eleventh Circuit's holding flouts decisions of this Court and is based on demonstrably false premises. It flouts this Court's decision in *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986) in three ways: (1) by categorically refusing to afford First Amendment protection to a cable system threatened with exclusion from the community by government action, (2) by permitting the City to continue economic regulation of Warner Cable's system in Niceville even as the City predatorily competes with that system and (3) by denying Warner Cable an opportunity to prove its claim that it would be silenced as a result of this tax-subsidized, below cost competition. It also ignores the jurisprudence of this Court, actions by the Congress and decisions of the Federal Communications Commission, all of which are premised on preserving localism as a core First Amendment value. Finally, by characterizing the situation in Niceville as a matter of simple economic competition between competing speakers (the outcome of which should be a matter of indifference under the First Amendment), the Eleventh Circuit wrongly equates the constitutional status of a government speaker with that of a private speaker.

I.

LOCALISM IS A SIGNIFICANT FIRST AMENDMENT VALUE

The Eleventh Circuit decision in this case sanctions a Faustian bargain between the municipal government and the citizens it purports to serve: In exchange for the promise of a few dollars off their cable TV bill (which likely will be added to every resident's tax bill), the citizens of Niceville lose the only editorial voice likely to eriticize that

government's activities or those of its officials. The First Amendment does not countenance such a bargain.

The premise that the value of ideas should be determined by the market for them, not by government, is the foundation upon which the First Amendment was built. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). Another basic premise of the First Amendment is that "a free press is indispensable to a free society." *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 145 (1973) (Stewart, J., concurring); *New York Times Co. v. United States*, 403 U.S. 713, 717 (1971) ("The press was protected so that it could bare the secrets of government and inform the people.") In the context of regulating broadcast discussion of public issues, Congress has expressed an unmistakable desire to preserve private control of the media. *Columbia Broadcasting*, 412 U.S. 94. Further, according to this Court, Congress' desire "is not one having peculiar applicability to television broadcasting. Its force is not diminished by the variant technology involved in cable transmissions." *F.C.C. v. Midwest Video Corp.*, 440 U.S. 689, 707 (1979).

The crucial role the electronic media perform as disseminators of local news and comment to the immediate communities they serve has long been recognized by the Federal Communications Commission (hereinafter, the "Commission" or "FCC") and by the courts. In the 1941 chain broadcasting rulings, the Commission first delineated local ownership rules that would ensure the responsiveness of broadcasters to the needs of the communities in which they operated. *Report on Chain Broadcasting*, Commission Order No. 37, Docket No. 5060 (May 1941). These early rules prohibited the common ownership of two or more AM radio stations and were premised on promoting diversity of program and service viewpoints to local listeners. *Id.* In support of these rules, the Commission stated that "local program service is a vital part of community life" and that licensees should "serve the needs of the

local community by broadcasting . . . outstanding local events . . . and other programs of local consumer and social interest." *Id.* As this Court noted in upholding these regulations, the Commission's recognition of localism as a significant value was fully consistent with the mandate given the Commission by Congress. *National Broadcasting Co. v. United States*, 319 U.S. 190, 217-18 (1943).

The promotion of "localism" is not only the underlying rationale of the Commission's local ownership rules, but also has been a fundamental goal governing the further development of the electronic media. *See, e.g., Sixth Report and Order on Television Allocations*, 1 Rad. Reg. (P&F) 91:601 (1952) (establishment of Table of Assignments would preserve frequencies for local stations to provide service to their communities); *Multiple Ownership Rules*, 22 F.C.C.2d 306 (1970) (the rules are designed to prevent any possible undue influence on local public opinion by relatively few persons or groups); *Low Power Television Service*, 51 Rad. Reg.2d (P&F) 476 (1982) (low power television is particularly well suited to the provision of diverse local program service); *First Report and Order in Broadcast Multiple Ownership Rules*, 4 F.C.C. Rcd. 1723,1724 (1989) (local ownership rules encourage ownership diversity "as a means of promoting diversity of program sources and viewpoints," not as an end in themselves).

Cable television is recognized as an important source of local news and information. *See CATV Program Origination*, 20 F.C.C.2d 201 (1969) (acknowledging cable television's great potential to increase the number of outlets for local self-expression and augment the public's choice of programs and services); *see also Teleprompter Corp. v. Columbia Broadcasting Sys., Inc.*, 415 U.S. 394, 403-04 & n.8 (1974).

Although the FCC's efforts at mandating local programming by cable systems were sometimes found to exceed the agency's authority under the Communications Act and

the First Amendment, *see, e.g., Report and Order in Program Origination and Cablecasting*, 49 F.C.C.2d 1090 (1974) (formally rescinding the mandatory local origination rule); *Midwest Video Corp. v. FCC*, 571 F.2d 1025 (8th Cir. 1978), *aff'd*, 440 U.S. 689 (1979) (holding that mandatory local access rules exceeded the jurisdiction of the Commission), cable television nevertheless has been cited as among the chief contributors to the dramatic increase in local media outlets. *Second Report and Order in Broadcast Multiple Ownership Rules*, 4 F.C.C. Rcd. 1741 (1989).

Cable television's local news and information services consist of far more than merely the "access programming" produced by the public and presented by the cable system. Consistent with Warner Cable's practice in Niceville, privately-owned cable systems produce and distribute original programs of importance to the specific communities they serve, including news programs featuring city council meetings, discussions and debates of local governmental affairs and coverage of local public events as well as a variety of sports and entertainment programs. *See* Petition of Warner Cable at 3-4, *Warner Cable Communications Inc. v. City of Niceville*, 911 F.2d 634 (11th Cir. 1990), *petition for cert. filed*, 59 U.S.L.W. 3674 (U.S. March 15, 1991) (No. 90-1463) (hereinafter "Petition"); "L.O. Programming Pulls in Advertisers," *Multichannel News*, April 1, 1991, at 24; "Guam Cable Scoops Up Big News Award," *Multichannel News*, March 25, 1991, at 22; "Windy City Warmed by Cable News Wars," *Multichannel News*, March 25, 1991, at 31; "Cable Does Local News," *Cable TV Business*, Sept. 15, 1990, at 27. That cable television makes an important contribution to the *local* marketplace of ideas is, therefore, undoubted.

While a government-owned cable system may decide to import signals from competing regional, state or national editorial voices (*e.g.* distant broadcast television stations, Cable News Network, etc.), it will face no competition in the local marketplace of ideas once Warner Cable's system

succumbs.[3] Warner Cable's system in Niceville, the *only* local media outlet, is a representative example of numerous situations around the country in which privately-owned systems have either been threatened with or are actually being overbuilt by a municipally-owned cable system. For instance, there are now six communities in which a privately-owned cable system has been overbuilt by a municipal cable system and 85 communities in which a municipal overbuild of a privately-owned cable system is pending. Kagan, *Cable TV Municipal Ownership*, March 8, 1991. Typically, these are small communities, not major metropolitan areas. As in Niceville, most of these communities have no local broadcast television (86 percent), or have no daily newspaper (71 percent). *Id.*; Broadcasting Yearbook 1990; Television and Cable Factbook 1990; Editor and Publisher Yearbook 1989.

The danger posed to the residents of Niceville, and to residents of more than two-thirds of the cities or towns facing a pending or existing municipal overbuild, is that the municipal government's action in silencing the privately-owned cable system deprives local residents of the *only* independent local *video* news and editorial voice.

II.

GOVERNMENT INFLICTION OF ECONOMIC INJURY ON A SPEAKER IS FIRST AMENDMENT INJURY

Although the City of Niceville has not threatened to send the constable to switch off Warner Cable's system in the City, the threat of predatory economic competition and regulation is just as real; and Warner Cable alleges it will have the same effect—excluding Warner cable from the marketplace in Niceville.[4] Warner Cable claims injury

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[3] The availability of regional, state or national speakers on the municipal cable system does not alleviate this problem. Such speakers will, at best, participate only sporadically in discussions of local issues.

[4] A variety of forms of predatory competition have been characterized

because the City will compete with it on substantially unequal terms by using subsidized low-rate financing, guaranteed by tax revenues; by shifting some of the costs of cable television to the City's monopoly public utility operations or to general tax revenue, resulting in below-cost pricing of cable television service to City cable system customers; and by not needing to include franchise fees and taxes as part of its price to customers.[5] Given these economic advantages and the ability to increase Warner Cable's costs through economic regulation (*see* pp. 15-19, *infra*), it is not surprising that a privately-owned potential overbuilder withdrew its franchise application in Niceville after the City expressed interest in building a municipally-owned system. Petition at 5. This exclusionary phenomenon does not result because of any peculiar characteristics of the business of cable television, but because the municipal government in these circumstances has such overwhelming advantages as a competitor that no private company can expect to survive in competition with it.[6]

Warner Cable (or any other privately-owned company) faces an avalanche of competitive handicaps in competing with a municipal government. Warner Cable is required to pay Niceville a franchise fee of five percent of its gross

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as "exclusionary" under Section 2 of the Sherman Act. 15 U.S.C. § 2 (1984). *See, e.g., Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 610-11 (1985); *Neumann v. Reinforced Earth Co.*, 786 F.2d 424, 427 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 851 (1986).

[5] Moreover, all of the residents of Niceville would have a unique financial incentive to subscribe to the municipal system—a default on the debt used to pay for the system would jeopardize the City's entire fiscal structure and would be a drain on the tax revenue.

[6] In fact, the Florida legislature has expressed its view that overbuilders should compete with existing cable operators on a "level playing field." Florida law provides "No municipality or county shall grant any overlapping franchises for cable service within its jurisdiction on terms or conditions more favorable or less burdensome that those in any existing franchise within such municipality or county." Fla. Stat. § 166.046(3)(1989).

revenues while Niceville, as the franchisor, will *not* be responsible for paying any similar fee to itself. Moreover, the City collects property taxes from Warner Cable. Even though it would be providing substantially identical services, Niceville would be exempt from paying any taxes or fees. Moreover, the City has stated that it would use revenues from those taxes to support cable television operations, rather than raise prices and risk losing customers to Warner Cable, its privately-owned competitor. These financial advantages, together with access to capital at tax-exempt rates and the ability to shift cable-related costs to other municipal services make a municipality a formidable competitor in the cable television business.

Indeed, the Eighth Circuit has recognized that the competitive advantages of a municipality in the cable television business are so great that elimination of the privately-owned cable company is a foreseeable consequence of municipal entry. The Eighth Circuit held that "the *displacement of competition* necessarily results" when municipalities enter the cable television business. *Paragould Cablevision, Inc. v. City of Paragould*, No. 90-1820, slip op. at 6 (8th Cir. April 15, 1991) (emphasis added).

Moreover, municipalities wield substantial regulatory power over cable systems as well. The Cable Communications Policy Act of 1984 (the "Act") gives municipalities substantial economic regulatory power over their privately-owned competitors. 47 U.S.C. § 521, *et seq.* (1984). The regulatory powers municipalities enjoy under the Act, therefore, allow them to force privately-owned cable operators into massive rebuilds and reconfigurations of their systems in hopes of securing franchise renewals. For example, under the Act, municipalities have the authority to determine, as a condition of renewal, the number of Public, Educational, and Governmental ("PEG") access channels a cable operator must set aside. *Id.* at § 531. This authority enables a municipality to limit indirectly the number of channels its privately-owned competitor has available for

commercial programming. The Act gives franchising authorities the power to control their privately-owned competitors' prices and to obtain advance knowledge of their competitors' moves in the marketplace. *Id.* at § 543. Further, under the Act, municipalities have the power to specify the overall channel capacity privately-owned cable operators must provide and to establish requirements for operators' studio and production facilities together with their equipment, such as vans and cameras, for PEG use. *Id.* at § 544. Thus, at renewal time, a municipality has the power to force substantial increases in a privately-owned cable operator's costs, putting it at a further disadvantage in competing with a government-owned system. Ultimately, if a municipality denies renewal of a privately-owned cable operator's franchise, the Act allows the municipality to force a sale of the cable system either to the municipality or another buyer. *Id.* at § 547.

Moreover, the franchise granted Warner Cable by the City of Niceville gives the City certain specific regulatory authority that could be used to competitive advantage: (1) control over the ability to install additional poles, (2) authority to regulate rates for installation of equipment and for basic services, (3) 45 days advance notice of any rate changes, and (4) authority to require Warner Cable to extend service to unserviced areas in response to subscriber requests regardless of the economic merit of making such an extension.

Where, as in Niceville, government threatens to control the media not simply by regulating it, but by direct commercial participation in the market, the risk to the public is more than a mere increase of government control over the discussion of public issues; it is a risk of the government's voice altogether supplanting that of the private media. *See Columbia Broadcasting*, 412 U.S. at 126. For cities and towns such as Niceville to enjoy any of the benefits of an independent local editorial voice, and for cable television to remain a credible participant in the local

marketplace of ideas, it is essential that privately-owned cable operators not be driven from that marketplace by predatory competition from municipal governments.

This Court has established that governmental exclusion of a cable operator from the marketplace "implicate[s] First Amendment interests" because "through original programming or by exercising editorial discretion over which stations or programs to include in its repertoire, [cable operators] seek[ ] to communicate messages on a wide variety of topics and in a wide variety of formats." *Preferred*, 476 U.S. 488, 494 (1986). The Eleventh Circuit held, however, that predatory competition and economic regulation were acceptable under the First Amendment: "Warner fails to assert a protected first amendment interest even if [commencing operation of] the . . . City-owned system will surely render Warner's continued operation in Niceville economically infeasible." *City of Niceville*, 911 F.2d at 636.

Such a conclusion leaves First Amendment speakers open to economic attack by municipal governments and is legal error. This Court consistently has held that government can inflict "First Amendment injury" by imposing economic loss. The choice of means used by government to silence a speaker does not govern the presence or absence of First Amendment protection. *See, e.g., Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781 (1988); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987); *Minneapolis Star Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983); *Buckley v. Valeo*, 424 U.S. 1 (1976); *New York Times v. Sullivan*, 376 U.S. 254 (1964); *Speiser v. Randall*, 357 U.S. 513 (1958); *Grosjean v. American Press Co.*, 297 U.S. 233 (1936).

For example, in *Riley*, the economic effect of litigation risks led this Court to invalidate a state statute regulating solicitation of charitable contributions. This Court recognized that the statute "will subject [fundraisers] to poten-

tial litigation over the 'reasonableness' of the fee . . . [T]he fundraiser must bear the costs of litigation and the risk of a mistaken adverse finding by the factfinder, even if the fundraiser and the charity believe that the fee was in fact fair." *Riley*, 487 U.S. at 794.

Similarly, in *New York Times v. Sullivan*, the risk of economic injury lead this Court to strike down an Alabama law compelling critics of official conduct to guarantee the truth of their factual statements. *Sullivan*, 376 U.S. at 279. "Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or *fear of the expense of having to do so.*" *Id.* (emphasis added).

Discriminatory taxation of the media is another purely economic act that this Court has held violates the First Amendment when the discrimination applies to speakers in the same medium. In *Arkansas Writers'*, *Minneapolis Star*, and *Grosjean*, this Court invalidated three different forms of taxation, each of which unconstitutionally discriminated among members of the press (either newspapers or magazines).[7] In none of these cases did the government seek to halt or even to interfere with the publication of any information; rather, the "First Amendment injury" resulted solely from application of a tax. The newspapers and magazines subject to discriminatory taxation were not precluded from speaking; instead, they suffered economic injury as a result of being targeted for increased tax liabilities, an act this Court, found to be repugnant to First Amendment principles. *See, e.g., Ar-*

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[7] Although this Court recently held that "differential taxation of speakers . . . does not implicate the First Amendment unless the tax is directed at, or presents the danger of suppressing, particular ideas[,]" this Court did not reject the holdings of its earlier decisions that government, by imposition of economic loss through taxation, can inflict First Amendment injury. *Leathers v. Medlock*, 59 U.S.L.W. 4281, slip op. at 12-13 (U.S. April 16, 1991) (Nos. 90-29, 90-38).

kansas Writers', 481 U.S. at 229-30; *Minneapolis Star*, 460 U.S. at 585; *Grosjean*, 297 U.S. at 250.[8]

The economic injury Warner Cable will sustain as a result of the predatory competition and sovereign advantages enjoyed by Niceville in its operation of a municipally-owned cable television system is no less harmful than the cost a newspaper might bear as a result of defending libel suits under the Alabama rule, the litigation risk and costs the charity solicitors in *Riley* would suffer in defending the "reasonableness" of their fee, or the diminished profitability the publications in the tax cases would suffer by paying a special tax. In each case, targeted government action results in economic injury to a First Amendment speaker. Moreover, unlike here, in those cases the government-imposed economic burdens did not threaten the speaker's very existence.

III.

A CITY MAY NOT ECONOMICALLY REGULATE AND COMPETE WITH A PRIVATELY-OWNED CABLE SYSTEM

In this case, the Eleventh Circuit evaded the inescapable conclusion under *United States v. O'Brien*, 391 U.S. 367 (1968) and under *Preferred* that the City's plan to continue economic regulation of Warner Cable while competing with it violates the First Amendment. The Court of Appeals did so by asserting that the ordinance providing for a municipal cable system had "no effect" on Warner Cable's speech. *City of Niceville*, 911 F.2d 634, 637. Aside from improperly having made a factual assumption to rebut

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[8] In addressing another form of economic injury, this Court held that "[i]f the Government may not impose a tax upon the expression of ideas in order to discourage them it may *not* achieve the same end by reducing the individual who expresses his views to second-class citizenship by *withholding tax benefits* granted others." *Speiser*, 357 U.S. at 536 (emphasis added).

Warner Cable's claims[9] (namely that the municipal cable ordinance and the City's resulting construction and operation of a tax-subsidized cable system would not affect Warner Cable's speech by undermining it economically), the Eleventh Circuit's rationale overlooks a fundamental point of the argument: The presence of the City as an economic competitor to Warner Cable changes the context in which its regulatory authority must be judged. If a showing of a "substantial government interest" is required to sustain more government regulation of a privately-owned cable system, then a higher showing should be required to sustain a combination of government regulation *and* predatory competition with a privately-owned cable system.

Since this Court's decision in *Preferred*, governmental regulation of cable television systems is scrutinized under the "substantial government interest" standard enunciated in *O'Brien*.[10] *Preferred*, 476 U.S. at 494. This Court left to the lower courts the task of defining the circumstances under which the First Amendment allows governmental regulation of cable television. *Id.* at 495-96.

Even before this Court's decision in *Preferred*, courts found that a government's ability to regulate a cable system operator consistent with the First Amendment was quite limited. In some cases, courts focused on the per-

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[9] Given the nature of the Eleventh Circuit's decision—that Warner Cable did not state a claim for relief under the First Amendment—the court should have assumed the truth of all of Warner Cable's factual allegations. *Jenkins*, 395 U.S. at 421; *Conley*, 355 U.S. at 45-46. Warner Cable claimed the City of Niceville would run it out of business; the Eleventh Circuit wrongly denied Warner Cable the opportunity to prove that claim at trial.

[10] Under the *O'Brien* test, a regulation is constitutional only if (1) it is within the constitutional power of the government; (2) it furthers an important or substantial governmental interest; (3) the government interest is unrelated to the suppression of free speech; and (4) the incidental restriction on First Amendment freedom is no greater than essential to further that interest. *O'Brien*, 391 U.S. at 377.

ceived uniqueness of cable television and the supposed lack of "competition" resulting from the presence of only one cable operator in a market. *See, e.g., Central Telecommunications v. TCI Cablevision, Inc.*, 800 F.2d 711 (8th Cir. 1986); *Omega Satellite Products Co. v. City of Indianapolis*, 694 F.2d 119 (7th Cir. 1982); *Community Communications Co., Inc. v. City of Boulder*, 660 F.2d 1370 (10th Cir. 1981); *Group W Cable, Inc. v. City of Santa Cruz*, 669 F. Supp. 954 (N.D. Cal. 1987); *Pacific West Cable Co. v. City of Sacramento*, 672 F. Supp. 1322 (E.D. Cal. 1987); *Century Fed., Inc. v. City of Palo Alto*, 648 F. Supp.1465 (N.D. Cal. 1986) ("*Century Fed. II*"); *Century Fed., Inc. v. City of Palo Alto*, 579 F. Supp. 1553 (N.D. Cal. 1984) ("*Century Fed. I*").[11]

After this Court's decision in *Preferred*, the Ninth Circuit and federal District Courts in California held that the "propriety of governmental regulations of noncommunicative aspects of speech is judged by the standard enunciated in *United States v. O'Brien*, 391 U.S. 367." *Century Fed. II*, 648 F. Supp. at 1475; *see also Group W Cable*, 669 F. Supp. 954; *Pacific West Cable*, 672 F. Supp. 1322.[12]

The district court in *Century Fed. II*, for instance, rejected the "unique characteristics" rationale enunciated by the Seventh, Eighth and Tenth Circuits:

> Although the fact that cable television places a heavier burden on the public domain than more traditional

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[11] Although most of the cases discussed in this section deal primarily with regulation of access to the market, the analysis is equally applicable to all forms of economic regulation.

[12] The Seventh Circuit, in a case decided after *Preferred*, adopted the district court's use of the *O'Brien* test as the appropriate framework for analyzing whether the governmental regulation violated plaintiff's First Amendment rights, but suggested that stricter First Amendment scrutiny was not precluded by the particular characteristics of cable television. *Chicago Cable Communications v. Chicago Cable Comm'n*, 879 F.2d 1540, 1548-49 (7th Cir. 1989).

> forms of the media may justify some government regulation of *that* burden, the defendant cities as a matter of law have failed to persuade this Court that there are any other differences attributable to cable television that can justify a degree of first amendment protection similar to that applied to the broadcast medium.

Century Fed. II, 648 F. Supp. at 1475 (emphasis added); *see also Group W Cable*, 669 F. Supp at 966-67 (city had a legitimate interest in the public safety of its citizens, which provided justification for *some* but not all government regulations).[13]

However, even under the test most favorable to government regulatory efforts, the existence of two cable systems competing in a particular market, especially when one of them is backed by the power of the municipal government, removes the justification for economic regulation. Therefore, allowing a city to be both economic regulator of and competitor with a cable television company is contrary to the First Amendment.[14] *See Tele-Communications of Key West, Inc. v. United States*, 757 F.2d 1330 (D.C. Cir. 1985) (holding that if cable company could show that there were no practical reasons why two cable operators could not serve Air Force base, Air Force's ex-

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[13] The court held that the public access requirements, the technical requirements, and the financial capability information requested by the city in its Request for Proposals to Provide Cable Television Services were also unconstitutional regulations. *Group W Cable*, 669 F. Supp. at 968-71; *see also Century Federal, Inc. v. City of Palo Alto*, 710 F. Supp. 1552, 1553 (N.D. Cal. 1987) ("*Century Fed. III*") ("defendant's access channel, universal service and state-of-the-art requirements violate the first amendment. . .").

[14] We do not argue that the City is barred from health and safety regulation to protect its citizens and the public domain; however, such regulation differs from economic regulation that has major First Amendment consequences.

clusive franchising regulation would violate the First Amendment).

Thus, even where a municipal government is *not* competing with a cable television company by means of tax-financed subsidies and other methods not available to a private party, it must show a substantial state interest to justify such regulation. Under such a test, a city has no more justification for economically regulating one of two competing cable companies than it has to regulate the home delivery time of the local newspaper, the amount of music played on the local radio station or the amount of time a local television station devotes to religious programming.

Where, as here, the government seeks to employ *all* the unique weapons at its disposal, including regulatory power, to silence a speaker through predatory economic competition, a compelling governmental interest should be shown. The City should have been required to show what compelling interest gives it the right to threaten Warner Cable's economic destruction through both predatory competition and economic regulation. The Eleventh Circuit's decision in this case leaves a gaping hole in the protection mandated by *Preferred*—the Court of Appeals would permit a government that does not care for a particular speaker to silence it by subjecting it to predatory economic competition from the government in a manner not tolerated from a private party as well as by subjecting it to substantial economic regulation.[15] This result cannot be allowed to stand.

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[15] As the *Paragould* decision held, the municipal government's actions—otherwise violative of Section 2 of the Sherman Act, 15 U.S.C. § 2—would be immune as "state action" under the doctrine of *Parker v. Brown*, 317 U.S. 341 (1943). *Paragould*, No. 90-1820, slip. op. at 6-7. Even if not immune under *Parker*, neither the local government nor its officials could be subject to an antitrust damage action as a result of the bar created by the Local Government Antitrust Act of 1984, 15 U.S.C. § 35 (1984).

CONCLUSION

The petition of Warner Cable Communications Inc. for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit should be granted.

Respectfully submitted,

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IN THE

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OCTOBER TERM, 1990

WARNER CABLE COMMUNICATIONS INC.,
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CITY OF NICEVILLE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* FOR CABLEVISION SYSTEMS CORPORATION IN SUPPORT OF PETITIONER

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MOTION OF CABLEVISION SYSTEMS CORPORATION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Cablevision Systems Corporation ("Cablevision") hereby moves, pursuant to Rule 37.2 of the Rules of the Court, for leave to file the attached brief as *amicus curiae* in support of the petition of Warner Cable Communications Inc. ("Warner Cable") for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit. Warner Cable has consented to the filing of the brief and its consent is being filed with the Clerk. Respondent has withheld its consent.

Cablevision is a cable television company operating cable television systems in 11 states, providing cable television services to approximately 1.5 million subscribers. Cablevision's subsidiary, Paragould Cablevision, Inc. ("Paragould Cablevision") of Paragould, Arkansas, is similarly situated to Warner Cable in that its challenge to the establishment of a rival cable television system by the City of Paragould ("the City") on First Amendment and antitrust grounds has been rejected by the Eighth Circuit. Taken together, the Eleventh and Eighth Circuit decisions have apparently been viewed by the City as a license to engage in any anticompetitive or oppressive activity calculated to eliminate Paragould Cablevision, as a First Amendment speaker, from the Paragould cable television market. Cablevision maintains that the freedom granted to cities by these decisions extends too far in that the decisions fail to provide adequate safeguards restricting the conduct of municipalities in cases such as these where First Amendment freedoms are clearly at stake.

The attached brief brings new and relevant information on this matter to the Court's attention. Accordingly, the motion to file the attached brief should be granted.

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BRIEF *AMICUS CURIAE* OF CABLEVISION SYSTEMS CORPORATION IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST OF *AMICUS CURIAE*

Cablevision Systems Corporation ("Cablevision") submits this brief *amicus curiae* in support of the petition for a writ of certiorari filed by Warner Cable Communications Inc.

Cablevision operates cable television systems in 11 states, providing cable television service to over 1.5 million subscribers. Cablevision's affiliate, Rainbow, provides a wide variety of programming, including a regional news service, News 12 Long Island; three national services, American Movie Classics, Bravo, and SportsChannel America; and ten regional sports channels.

Paragould Cablevision, Inc. ("Paragould Cablevision"), an indirect subsidiary of Cablevision, is currently being challenged by a municipally-controlled cable

system in Paragould, Arkansas. Litigation brought by Paragould Cablevision raising claims under the First Amendment and federal antitrust laws is currently pending on petition for rehearing and suggestion for rehearing en banc in the United States Court of Appeals for the Eighth Circuit. *Paragould Cablevision v. City of Paragould*, 1991-1 Trade Cas. (CCH) ¶ 69,403 (8th Cir. Apr. 15, 1991), *petition for rehearing en banc* filed May 10, 1991. While not seeking to have its case reviewed by this Court at this moment, that case and Cablevision's experience add support to Warner Cable Communications Inc.'s ("Warner Cable") petition that this case raises important nationwide constitutional questions meriting this Court's review.

REASONS FOR GRANTING THE PETITION

1. The issues and the factual situation raised in the pending petition for a writ of certiorari are not unique to Niceville, Florida or to petitioner Warner Cable. They are relevant nationwide. Paragould Cablevision, for example, an indirect subsidiary of Cablevision, is currently being challenged by a municipally-controlled cable system in Paragould, Arkansas. The Paragould situation is more advanced than that in Niceville—the Paragould municipal system, City Cable, is operational. The actual tactics employed in Paragould parallel the announced plans of Niceville here in many respects, and the intent of the cities in both cases, to oust and destroy the private cable speaker, is clear. Whether viewed from the perspective of an economic market or from that of the marketplace of ideas, it is also clear that without the intervention and guidance of this Court, the political and economic motivations of the municipalities will inevitably lead them to trample upon, and brush aside, the First Amendment protections of private cable speakers and the rights of their own citizenry.

Paragould Cablevision has been providing cable service to subscribers in the City of Paragould, Arkansas since

1963. Its current Franchise Agreement with the City runs from December 10, 1983 to December 9, 1993 with provisions for two five-year extensions. Under its Franchise Agreement, Paragould Cablevision is required to pay the City a franchise fee equal to three percent of its gross receipts from the sale of cable television services, and to pay an annual rental charge to the municipally-owned light and water utility, Paragould Light and Water Commission ("CLW"), for the use of the Commission's utility poles. The system has over 6,000 subscribers.

In 1986, the voters of the City of Paragould approved an ordinance authorizing CLW to construct and operate a duplicative, municipally-owned cable television system. In June 1988, the City adopted an ordinance authorizing CLW to acquire, construct and operate a cable television system and entered into a franchise agreement with CLW. After being authorized through an election vote of 1,549 to 1,102, the City enacted a bond ordinance on January 22, 1990 authorizing the sale of general obligation bonds for the financing of the cable system; the bonds are secured by pledges of revenues derived from the system and, if necessary, by increased real estate taxes on all citizens in Paragould. In other words, the bonds are backed or secured by the taxing powers and real estate taxes of the City.

The municipal system began operations in March, 1991. In implementing these plans, the governmental officials in Paragould have revealed unmistakably that their aim is not to provide an alternative voice in Paragould, but to become the only cable speaker available to Paragould citizens. Moreover, they believe by their actions and statements that there are no constitutional or other limitations on the means they may employ to reach that objective:

—The publicly announced plans and financial projections of the municipal system are based upon assumptions that require CLW to capture the vast bulk of cable subscribers.

—Instead of the private and government-controlled cable speakers competing in the marketplace of ideas for acceptance, the government system is emphasizing that if too many citizens prefer the private cable speaker, higher property taxes will be required to subsidize the government speaker.

—Paragould Cablevision believes that the government cable speaker is being improperly cross-subsidized by CLW, the municipally-owned utility, and that the government is attempting to leverage its utility monopoly to drown out, through economic preclusion, Paragould Cablevision, the private speaker. To date, Paragould Cablevision has been denied a trial to establish this point.

—When Paragould Cablevision notified the City of its desire to exercise its First Amendment commercial speech rights by transmitting local advertising on its system, the City insisted on an elaborate negotiation process before it would allegedly "authorize" the commercial speech. Specifically, the City insisted that its authorization would be dependent upon Paragould Cablevision paying the City a percentage of its advertising revenues under the Franchise Agreement, despite the fact that the franchise fee is limited to revenues from the sale of cable television services and City Cable's Franchise Agreement has not been construed to restrict advertising, to require negotiations with the City to permit advertising or to pay franchise fees on advertising.[1] The revenues derived from local advertising would help Paragould Cablevision

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[1] In the pending federal litigation between Paragould Cablevision, the City and CLW, Paragould Cablevision has challenged this conduct as violative of the First Amendment. The Eighth Circuit held that while Paragould Cablevision's First Amendment claims were valid, Paragould Cablevision waived its free speech rights when it signed the initial franchise agreement. *Paragould Cablevision, supra.* Paragould Cablevision has challenged the ruling on rehearing. *Compare Brookhart v. Janis*, 384 U.S. 1 (1966); *Chicago Cable Communications v. Chicago Cable Comm'n*, 879 F.2d 1540 (7th Cir. 1989), *cert. denied*, 110 S. Ct. 839 (1990).

offset revenues lost when any subscribers switched to City Cable and thereby help it attempt to sustain itself as an independent, non-governmental speaker in Paragould. The City again provides its own system an unfair competitive advantage.

—In the pending litigation with Paragould Cablevision, the City of Paragould has expressed the position that its conduct is entirely exempt from scrutiny under both federal antitrust law and the First Amendment.[2]

The plans and conduct of the municipal officials in Paragould, Arkansas and Niceville, Florida so eerily resemble each other, it is as if a battleplan has been established as to how a local government can silence an unwanted private cable speaker. This pattern, as pointed out in Warner Cable's petition, is spreading across the nation. The number of threatened municipal overbuilds has increased from 10 to more than 80 in the past two years.[3] The United States Court of Appeals for the Eleventh Circuit has now given those battleplans its constitutional endorsement. Unless that decision is reviewed and set aside by this Court, an increasing number of private cable speakers will be silenced without even the benefit of trial, as has been the case here and vis-a-vis Paragould.

2. This Court has explicitly recognized that cable is entitled to First Amendment protection. *See, e.g., City of Los Angeles v. Preferred Communications*, 476 U.S. 488

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[2] *See* Brief of City of Paragould, Arkansas, et al. at 16, 18, *Paragould Cablevision v. City of Paragould* (8th Cir. Apr. 15, 1991) (No. 90-1820). The Eighth Circuit has confirmed that position with respect to the antitrust laws, a holding Paragould Cablevision is challenging on rehearing.

[3] Brief of Warner Cable Communications Inc., at 12 n.11, *Warner Cable Communications v. City of Niceville*, 911 F.2d 634 (11th Cir. 1990) (No. 90-1463). The City of Paragould's municipal cable system has reported numerous inquiries from other cities. "Paragould CLW Gets Tough On Leaks," *Jonesboro (Ark.) Sun*, Mar. 21, 1991, at 14B. "City Cable Will Be Better Value, CLW Claims," *Paragould Daily Press*, Jan. 23, 1991.

(1986); *see also id.* at 496 (Blackmun, J., concurring). This Court has also emphasized that cable speakers exercise "a significant amount of editorial discretion regarding what their programming will include." *FCC v. Midwest Video Corp.*, 440 U.S. 689, 707 (1979). As the Court recently recognized: "Cable television provides to its subscribers news, information and entertainment. It is engaged in 'speech' under the First Amendment, and is, in much of its operation, part of the 'press.'" *Leathers v. Medlock*, 111 S. Ct. 1438, 1442 (1991). In asessing the importance of the petition presented here, we urge the Court to consider carefully the chilling or censoring effect the Court of Appeals' ruling will inevitably have.

Again, Cablevision seeks to illustrate the point with its own activities. Cable speakers have been able to fill the void of local news and information coverage passed over by broadcast television in those markets with television outlets, and cable is the only video provider of such core First Amendment material in the many thousands of localities like Niceville, Florida, and Paragould, Arkansas that lack television stations. Cablevision, for example, has created innovative local news programming, including News 12 Long Island and News 12 Connecticut. These programs provide local news of interest to residents and contribute to a regional identity in each of the areas served.

For example, News 12 Long Island now serves over 600,000 subscribers and "has become a pervasive force . . . providing commentary and insight on Long Island's 108 diverse towns and villages.[4] News 12 Long Island "has provided Long Island viewers with local news coverage in a vacuum left virtually untouched by the network affiliates and local broadcasters covering the New York metropolitan area."[5] News 12 Long Island pro-

[4] "The Media Business; Growth of Local-News Station Is Watched by Cable Industry," *N.Y. Times*, Sept. 5, 1988, § 1 at 30.

[5] "News 12's Success Spawning Clones," *Multichannel News*, Feb. 19, 1990 at 4.

vides coverage of the governmental entities that license private cable speakers and that could launch government-owned cable speakers, and whose coverage of local government affairs would inevitably and undoubtedly be different. News 12 recently received two local Emmy awards in categories where it competed with all New York metropolitan television stations.

While a pioneer, Cablevision's award-winning local news innovations are not unique. Similar news channels are underway in Orange County, California and the Chicago area; others have been announced for the Boston and Washington, D.C. regions and in New York City.[6] A company has targeted this phenomenon to provide cable systems with supplementary national and global newsfeeds to augment the local news coverage.[7] Buoyed by the interest in and success of Gulf War coverage provided by the cable networks CNN and C-SPAN, the cable industry is launching wide-spread expansion of its local news cable channels in the 1990s.[8]

This entire development could be threatened or affected in perverse ways by the foreseeable effects of the Court of Appeals' decision, if unreviewed. Instead of the robust coverage by the press of local events that is at the core of the First Amendment,[9] private cable speakers

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[6] "Fires, School Board Meetings, and Accidents—24 Hours a Day," *Business Week*, Dec. 17, 1990, at 32.

[7] "All News Channel Pursuing Cable Deals," *Electronic Media*, Jan. 28, 1991, at 16.

[8] *Id.*; *see also Broadcasting*, Apr. 1, 1991, at 31.

[9] *See, e.g., Mills v. Alabama*, 384 U.S. 214, 219 (1966) ("the press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were elected to serve."); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969) ("It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee.").

would inevitably be chilled by the knowledge that candid, perhaps critical, coverage might trigger the creation of government cable speakers which have been given a constitutional free pass to use tax subsidies, cross-subsidies from local utilities, pervasive regulatory powers over cable, discriminatory taxes and virtually any other means to silence the critical video printing press. The implications of the absence of review by this Court are enormously sobering.

3. Warner Cable's petition persuasively establishes a multitude of independent reasons why this Court should review the judgment below, establish guidelines, and explain the need for a remand for trial. Cablevision believes that the considerations outlined above further support the rationale for granting the petition.

In assessing whether the First Amendment analysis employed by the Court of Appeals is flawed, this Court should also be aware of federal governmental interests that, in our view, undercut the Eleventh Circuit's erroneous or facile conclusion that the First Amendment can never be abridged by the conduct challenged here. First, in contrast to the *carte blanche* accorded by the *Niceville* court, Congress has directed in the Cable Communications Policy Act of 1984 that cable systems are entitled to significant protections against the unfair and arbitrary renewal actions previously practiced by franchising authorities.[10] Local political officials can evade these safeguards by threatening to overbuild or by overbuilding.

Second, the Federal Communications Commission, charged with supervisory policy authority over cable television, has articulated a strong policy preference for the grant of more franchises for additional cable speakers, rather than monopoly speakers, whether private or gov-

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[10] *See* Cable Communications Policy Act of 1984, 47 U.S.C. § 546 (1991). *See also* H.R. Rep. No. 934, 98th Cong., 2d Sess., at 72 (1984), *reprinted in* 1984 U.S. Code Cong. & Admin. News, 4655, 4709.

ernmental.[11] Hence, whether the First Amendment issues are analyzed under *United States v. O'Brien*, 391 U.S. 367 (1968), as the Court of Appeals found, or under a stricter standard, as Warner Cable argues,[12] these governmental interests must be weighed carefully, after a full trial, a weighing the Court of Appeals erroneously refused to permit.

CONCLUSION

The petition for a writ of certiorari for the United States Court of Appeals for the Eleventh Circuit should be granted.

Respectfully submitted,

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[11] *See* Report, *In the Matter of Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service*, 5 FCC Rcd 4962, 5033-37 (July 31, 1990).

[12] Brief of Warner Cable Communications Inc., *supra* note 3, at 24.

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No. 90-1463

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

WARNER CABLE COMMUNICATIONS INC.,
Petitioner,

v.

CITY OF NICEVILLE,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF *AMICUS CURIAE* OF COMMUNITY ANTENNA TELEVISION ASSOCIATION IN SUPPORT OF PETITIONER

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MOTION OF COMMUNITY ANTENNA TELEVISION ASSOCIATION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Community Antenna Television Association ("CATA") hereby moves, pursuant to Rule 37.2 of the Rules of the Court, for leave to file the attached brief as *amicus curiae* in support of the petition of Warner Cable Communications Inc. ("Warner") for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit. Warner has consented to the filing of the brief and its consent is being filed with the Clerk. Respondent has withheld its consent.

CATA is a national organization that represents cable television system operators serving over 40 million subscribers throughout the country, in every state and in the U.S. territories. Many of these operators currently face —or are likely to face in the future—attempted over-

builds by a government-owned cable system similar to that proposed by the respondent in this case. Small market operators represented by CATA are particularly vulnerable to either displacement or intimidation by a cable system subsidized below cost by a municipality. Such intimidation can take either the form of actual municipal construction of a cable overbuild, or the threat to do so, which can be used to distort the franchise renewal process. CATA members are often one of very few local editorial voices, if not the only such voice, independent of the government in their communities.

The attached brief brings relevant matter to the attention of the Court that has not already been brought to the Court's attention. Accordingly, the motion to file the attached brief should be granted.

Respectfully submitted,

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BRIEF *AMICUS CURIAE* OF COMMUNITY ANTENNA TELEVISION ASSOCIATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

Community Antenna Television Association ("CATA") submits this brief as *amicus curiae* in support of Warner Cable Communications Inc. ("Warner"), petitioner for a writ of certiorari in the above-referenced case.

CATA is a national organization that represents cable television system operators serving over 40 million subscribers throughout the country, in every state and in the U.S. territories, before Congress, the Federal Communications Commission and the courts. Many of these operators currently face—or are likely to face in the future—attempted overbuilds by a municipally owned cable system similar to that proposed by the City of Niceville, Florida, respondent in this case.

CATA has historically focused its efforts not on representing primarily the operators that control the major urban cable systems, but rather on representing small market cable operators. These small market operators are particularly vulnerable to either displacement or intimidation by the threat of an overbuild by a municipality that has the power to annihilate any competition through deep financial pockets based on the municipality's power to tax coupled with aggressive use of its pervasive regulatory authority over its competitor.

In these small markets, moreover, the cable operator is often the only local electronic editorial voice that is independent of the government. There are no broadcast television stations in many markets in which CATA members operate. In others, the cable operator provides one of very few local electronic, or even print, editorial voices. CATA members are providing local news and coverage of town councils, school board meetings and other local events and issues. One CATA member, Guam Cable Television, for example, recently received one of journalism's prestigious Polk Awards for 200 local reports exposing illegal transfer of public lands into private hands.[1]

CATA's *amicus* brief will illustrate that the issues Warner asks this Court to resolve will have a substantial nationwide impact on the speech rights of cable operators, far beyond the particular Florida community where the City of Niceville is seeking to supplant Warner's cable system.

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[1] See The Washington Post, Mar. 16, 1991, at A13.

REASONS FOR GRANTING THE PETITION

I. THE ELEVENTH CIRCUIT'S DECISION WILL ENCOURAGE OTHER CITIES TO DISPLACE OR CHILL THE SPEECH OF INDEPENDENT CABLE OPERATORS

A. Municipalities Will Use Their Powers Of Regulation And Taxation To Favor Their Own Cable Systems And Drive Out Independent Cable Voices

The central issue in this case is the constitutionality of allowing a government speaker to drive out a private speaker through the use of its powers of taxation and regulation. In such situations, which are faced by CATA members, there is no way that a privately owned cable system can survive.

To find, as the Eleventh Circuit did without even a trial on the merits of Warner's allegations, that a city can always be presumed to act fairly as both a competitor in the field of cable speech and an unbiased regulator of the competitor over which it holds pervasive powers—including the life and death power of franchise renewal—is a fantasy. Competition is only fair if all cable operators that are franchised in a particular market are subject to the same franchise fees, the same regulations, and the same standards of conduct. Here, however, the record shows that Niceville's proposed system would operate at below-cost rates and that the city would use tax revenues to subsidize operating deficits and to meet its construction bond obligations. CATA members cannot "compete" against such a system.

Municipalities hold, under the federal Cable Act adopted in 1984,[2] extremely broad powers over their cable franchisees. Cities can assess a franchise fee of up to five percent of an independent cable operator's gross

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[2] Cable Communications Policy Act of 1984, 47 U.S.C. §§ 521-559 (1991) ("Cable Act").

revenues. In the franchises they grant, they can set customer service requirements at a stringent threshold. They can set and enforce aggressive construction deadlines and line extension policies that require cable operators to extend service into portions of a community that must be economically subsidized because of the low density of homes per mile. A municipality often is entitled by a franchise's terms to review in detail the financial records of the cable operator. When a municipality becomes a competitor to an existing franchised cable operator, all of these powers to regulate their competitor become powers to destroy.

This Court has recently reiterated that cable operators are members of the press. See *Leathers v. Medlock*, 111 S. Ct. 1438, 1442 (1991) ("Cable television provides to its subscribers news, information, and entertainment. It is engaged in 'speech' under the First Amendment, and is, in much of its operation, part of the 'press.' "). While a serious imbalance created by a municipality's powers of regulation and taxation may be tolerated in other competitive contests between municipality-owned services and competing independently regulated entities (for example, in garbage collection services), it is not acceptable in the First Amendment media context.

In the case before the Court, Niceville will be acting as both regulator and competitor. It intends to cross-subsidize operating deficits from general tax revenues, including a $2 million bond issue to construct the cable system supported by tax revenues. The city will impose a five percent franchise fee on Warner but it will bear no similar economic burden. Niceville's own cable system will enjoy tax immunity, while Warner will pay property, sales and income taxes. As its regulator, the city can compel Warner to reach subscribers in less densely populated areas, has the right to inspect Warner's books and records and ask for other confidential business information, dictates and oversees Warner's level of cus-

tomer service, has the power in its franchise to regulate its competitor's rates, and holds the ultimate power of denial of renewal of Warner's franchise. This could lead to governmental control of the electronic press in Niceville.

To use the Court of Appeals' own analogy, at a minimum, a trial is needed in this case to determine whether in fact the city of Niceville's particular governmental "soapbox" is so powerful and inherently predatory that it will necessarily overwhelm Warner's existing private electronic "soapbox," as well as prevent other similar private electronic soapboxes from being established. A trial will determine whether the government, through its taxing and regulatory powers, will in this particular community necessarily end up as the only remaining cable speaker—indeed, the only remaining video speaker, since there is no local television broadcasting station in Niceville.

B. Even Where A City Does Not Build A Competing Cable System, The Eleventh Circuit Decision Will Encourage Cities To Threaten To Do So In Order To Undermine The Cable Operator's Franchise Renewal Protections In The Federal Cable Act

Based on the experience of CATA's members, the fallout from the Eleventh Circuit's decision, were this Court not to reverse it, would go beyond simply encouraging many other municipalities to undertake similar city-owned overbuilds. Even in those communities where municipal cable systems are not actually financed and constructed, city franchising authorities will use the Eleventh Circuit's decision as leverage to undermine the scheme set up by the Cable Act for a franchise renewal process that protects cable operators against municipal overreaching.

Cities would be likely to use the threat of establishing a municipal cable system to achieve their ends without needing to follow through on that threat. A city can assert that unless the cable operator agrees to franchise

conditions that are not required by—or may even be contrary to—the Cable Act in order to gain renewal, the city will use its taxing power to raise funds for a municipally owned competitor that will drive the independent operator out of business.

Congress in 1984 found that the cable franchise renewal process had been abused by cities, who had sought to extract programming and other inappropriate and onerous concessions as a *quid pro quo* for grant of a franchise.[3] One of the basic purposes of the Cable Act was to "establish an orderly process for franchise renewal which protects cable operators against unfair denials of renewal where the operator's past performance and proposal for future performance meet the standards established by this [title]." [4]

Under the scheme established by Section 626 of the Cable Act, [5] a cable operator at the end of its current franchise term need only provide the city with basic information about its franchise term performance, its past customer service, and its capability to carry out a reasonable future proposal. The Cable Act has procedural protections to insure that the record of a renewal proceeding is limited to consideration of these factors, and does not include judgments as to the value of specific programming choices made or proposed by the cable operator.

If the Eleventh Circuit's decision stands, a municipality can use it to bypass the federal Cable Act's franchise renewal criteria and due process safeguards. If a city cannot find grounds for nonrenewal under the Cable Act, it can threaten to subsidize a below-cost municipal cable system to drive out competition, unless a cable operator provides whatever programming services the city wants and sells them in a manner desired by the city. Faced

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[3] See H.R. Rep. No. 934, 98th Cong., 2nd Sess. at 21-22 (1984); reprinted in 1984 U.S. Code Cong. & Admin. News 4655, 4658-59.

[4] 47 U.S.C. § 521(5).

[5] 47 U.S.C. § 546.

with this harassment potential, it is difficult, particularly for smaller cable operators, to continue to assert their independent right to choose and market cable programming services as these operators, as independent members of the press, determine should be provided to their communities. Cities will thus be tempted once again to impose the kinds of content-based judgments and conditions that the Cable Act was designed to eliminate from the franchising process. This intimidation is already occurring. The Eleventh Circuit's decision will only accelerate it.

II. SIMILAR MUNICIPAL CABLE OVERBUILD ISSUES ARE PENDING BEFORE SEVERAL OTHER COURTS, WHICH NEED GUIDANCE IN THIS AREA

Litigation is pending in federal and state courts in several jurisdictions based on this type of overreaching by municipalities in their attempt to supplant the speech of independent cable operators. Municipal cable system overbuild cases that involve not only First Amendment claims but also claims based on instances of predatory municipal actions that raise antitrust, due process, breach of contract and other claims, are pending in the Fourth Circuit,[6] the Eighth Circuit,[7] and federal district courts in Missouri,[8] Michigan,[9] and Kentucky.[10]

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[6] *Madison Cablevision, Inc. v. City of Morganton*, No. 90-1500, *appeal from* Case No. SH-C-86-5, 1986 WL 22246 (W.D.N.C. 1990). *See also Madison Cablevision, Inc. v. City of Morganton*, 386 S.E.2d 200 (N.C. 1989).

[7] *Paragould Cablevision v. City of Paragould*, 1991-1 Trade Cas. (CCH) ¶ 69,403 (8th Cir. Apr. 15, 1991), *petition for rehearing en banc* filed May 10, 1991.

[8] *Rolla Cable System, Inc. v. City of Rolla*, No. 89-2101C(2) (E.D. Mo. Apr. 15, 1991) (cross appeals to 8th Cir. lodged).

[9] *Bresnan Communications v. City of Negaunee*, M84-219-CA2 (W.D. Mich.) (partial summary judgment granted Aug. 17, 1989; First Amendment, equal protection, due process claims pending).

[10] *TeleScripps Cable Co. v. City of Glasgow*, No. C-88-1069-BG(M) (W.D. Ky. filed Nov. 4, 1988).

Other suits are pending in state courts. Since there are now well over 100 communities in which municipally owned cable systems either have been constructed or are being considered,[11] this litigation is likely to continue.

CATA believes that a First Amendment issue is raised for trial whenever a cable company alleges that a city intends to silence its speech through a combination of regulation of the company's activities and unfair economic competition to it. The Eleventh Circuit, to the contrary, has stated: "Warner fails to assert a protected first amendment interest even if the projected City-owned system will surely render Warner's continued operation in Niceville economically infeasible."[12]

III. CABLE'S CRITICAL ROLE AS A FIRST AMENDMENT SPEAKER IS THREATENED BY THE ELEVENTH CIRCUIT'S DECISION

Millions of Americans experienced cable as the medium of choice for news and information during the Congressional debates on C-SPAN on the Persian Gulf War, and the subsequent coverage of that war by Cable News Network (CNN). Some government officials were highly critical of that coverage. This recent phenomenon illustrates that the cable medium cannot be held to be of such little First Amendment consequence that a municipality is given *carte blanche* by a federal court, without even a trial on the merits, to drive it out of business, or direct its editorial policy, so that the municipality can become the preferred—and potentially the sole—cable speaker. This decision could lead to cities telling cable operators whether they can carry CNN or other national or regional satellite-delivered networks, and threatening to

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[11] See Paul Kagan Associates, *Cable TV Franchising*, Mar. 25, 1991 (attachment on "Cable TV Municipal Overbuilds").

[12] *Warner Cable Communications Inc. v. City of Niceville*, 911 F.2d 634, 636 (11th Cir. 1990); See Warner Petition for Certiorari, Appendix p. 5a.

drive them out of business through a municipal "competitor" if they do not comply.

Cable today is not only acting as a critical editorial source of information on national and regional events. Local cable systems are also, as noted above, increasingly providing local news and coverage of local events and offering a forum for local candidates—in some markets as the only electronic media outlet for such information. The Eleventh Circuit's decision is extremely hostile to cable as a free speech medium, holding in essence that an independent cable operator can never make a case that a municipality proposes to use predatory economic competition to drive it out of business. Such a holding cannot be allowed to stand if the Court wishes cable television to continue as a robust purveyor of speech.

CONCLUSION

For the foregoing reasons, Warner's petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 90-1463

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

WARNER CABLE COMMUNICATIONS INC.,
Petitioner,

v.

CITY OF NICEVILLE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF FOR THE NATIONAL CABLE TELEVISION ASSOCIATION, INC., IN SUPPORT OF PETITIONER

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MOTION OF THE NATIONAL CABLE TELEVISION ASSOCIATION, INC., FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The National Cable Television Association, Inc., hereby moves, pursuant to Rules 21 and 37 of the rules of this Court, for leave to file the attached brief *amicus curiae* in support of petitioner. Counsel for petitioner has consented to the filing of this brief, but counsel for respondent has declined to do so.

The National Cable Television Association, Inc. (NCTA), a non-profit corporation, is the principal trade association representing cable television operators in the United States. Its members operate cable systems serving approximately 90 percent of the country's more than 50 million cable television subscribers. In this case, the

court of appeals ruled that the First Amendment is simply not implicated when a government entity creates its own cable system and competes with a private system, no matter how unfair the competitive advantages the government gives to its own system, no matter what the effect on the viewership or even survival of the private system, and no matter what the justifications, legitimate or illegitimate, for the government's effort to take viewers away from the private cable operator. This ruling is of vital concern to the NCTA because of the increasing number of municipalities that have recently decided to operate their own cable systems in competition with private cable operators. *See* Pet. 12 n.11. In addition, we believe that, because of its broad representation of cable operators, the NCTA has a familiarity with the issues presented that will be of assistance to this Court.

For the reasons stated above, movant asks that its motion be granted.

Respectfully submitted,

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QUESTION PRESENTED

Whether a decision by a city to create its own cable television system, with the intent to take substantial numbers of viewers away from a competing private cable operator, is entirely immune from First Amendment scrutiny, even if the city uses its governmental powers to confer special competitive advantages on its own system and even if the result is to drive the private cable operator entirely out of business.

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BRIEF AMICUS CURIAE FOR THE NATIONAL CABLE TELEVISION ASSOCIATION, INC., IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE

The interest of amicus appears from the foregoing motion.

STATEMENT

Petitioner Warner has for almost two decades operated a cable television service in Niceville, Florida, under a non-exclusive franchise from respondent Niceville (the City). Almost 85 percent of the homes in Niceville subscribe to the service. The Warner system originates its own programs and selects programs from among local sources and numerous nationally available networks and other programmers. The 44 channels on the system in-

clude entertainment, news, sports, local government coverage, and religious and educational programs. The local public affairs programming provides the only regularly available television coverage of local political activity, which is not covered by the nearest over-the-air broadcast stations. Pet. 3-4, 18 n.16.

In 1985, after a public referendum, the City decided to build a competing cable system that would underprice petitioner. The City anticipated capturing at least 50 percent, perhaps more than 75 percent, of petitioner's customers. One key City official declared that the City's system, in fact, would become the exclusive cable television service in Niceville. Pet. 7; Pet. App. 75a (chairman of Cable Commission) ("there is not gonna' be a competitive system in Niceville"). As modified in 1986, the City's plan was for its cable system to be run, and programs to be chosen, by a board whose members were appointed by the Mayor and members of the City Council. Pet. 5 n.6.

Petitioner brought this suit alleging, among other things, that the City's plan to operate its own cable system violated the First Amendment. As developed by evidence presented on motions for summary judgment, petitioner's claims challenged both the purposes and the effects of the City's decision. With regard to purposes, petitioner presented evidence that the City took its action partly out of disagreement with the actual and prospective substantive editorial choices made by petitioner; in particular, the City was displeased with petitioner's decision to drop the Praise the Lord's Inspirational Network and was concerned that New York officials were making programming decisions for Niceville. Pet. 5. More generally, petitioner claimed that the City lacked a sufficient legitimate justification for entering the cable business with the specific intent to take away petitioner's audience. Pet. App. 40a.

With regard to effects, petitioner claimed that the City's actions not only would draw off more than half of petitioner's audience, as expressly anticipated, but would predictably drive Warner out of business altogether, leaving only the City's own cable operation. Pet. 6-8; Pet. App. 41a. According to the allegations and evidence advanced by petitioner, the City would achieve that aim by conferring distinctive advantages on its own system, thereby making petitioner's system unable to compete fairly on the merits. Notably, the City's system, unlike petitioner's system, would not have to bear a franchise fee of five percent of gross revenues; the City's system, unlike petitioner's, would enjoy immunity from property, sales, and income taxes; the City's system, unlike petitioner's, would be under no obligation to make a profit to pay investors; the City's system, unlike petitioner's, would resort to general municipal funds and resources to cross-subsidize its cable costs; and the City's system, unlike petitioner's, would be able to pledge tax revenues to raise capital. *See* Pet. 6. Petitioner added that the City had the power to reinforce the unfair competitive advantages gained from aiding its own system by using its broad regulatory control over petitioner's system to increase the burdens on petitioner. *See* Pet. 4, 6-7.[1] According to petitioner, the City was violating the First Amendment by undertaking to capture petitioner's audience—and eventually to silence petitioner entirely—through unfair competition achieved by the ex-

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[1] In addition to having power over renewal of petitioner's franchise, the City may invoke authority to regulate petitioner's rates and services and to inspect confidential business information of petitioner. The City in the past not only has tried to influence petitioner's programming decisions but has exercised substantial control over the construction and maintenance of the cable network. Conceivably, the City could decide to build its system only where population densities were great (and costs were therefore lower), while requiring petitioner to serve remote, sparsely populated areas (thereby increasing petitioner's costs).

ploitation of distinctive governmental advantages, all without adequate justification.

The district court, on cross motions for summary judgment, rejected petitioner's First Amendment challenge as unripe for decision. Pet. App. 35a-45a. The court concluded that petitioner could not make a First Amendment claim based on mere loss of audience but would have to prove that its speech was totally suppressed through the City's driving petitioner entirely out of business. *Id.* at 41a. Although the district court observed that petitioner might well be able to prove that the City's unfair competition would have that result (*ibid.*)—and, indeed, might even be able to prove that its "'voice' was *targeted* for suppression by the City" (*id.* at 44a (emphasis added))—the court held that no First Amendment claim was ripe until the actual suppression occurred. *Id.* at 44a-45a.

The court of appeals affirmed on different grounds. Pet. App. 4a-12a. The court did not hold that petitioner's First Amendment claim was merely unripe. Rather, it held that petitioner had no First Amendment claim at all: "We conclude that Warner fails to assert a protected first amendment interest even if the projected City-owned system will surely render Warner's continued operation in Niceville economically infeasible." *Id.* at 5a.

The court first reasoned that petitioner's right to speak simply was not being abridged. In its view, the City's creation of its own cable system left petitioner's "access to the Niceville cable television market unimpeded by any newly imposed restrictions as to time, place, or manner" and "neither regulated the conduct through which Warner communicates its message nor restrict[ed] Warner's access to its audience." Pet. App. 7a. The court recognized that the "City-owned cable system, if successful, will no doubt reduce the audience for Warner's speech and diminish the profitability of that speech," but it concluded that "[s]uch economic loss . . . does not con-

stitute a *first amendment injury.*" *Ibid.* For that reason, the court ruled: "Warner's freedom of expression remains unimpaired by the City's plan." *Ibid.*

The court of appeals acknowledged that a First Amendment problem would arise if the government spoke "so loudly as to make it impossible for other speakers to be heard by their audience," thereby "preventing the speakers' access to that audience." Pet. App. 8a. Such "drowning out" of the voice of private speakers might occur, for example, if the government built a soapbox with lights and loudspeakers next to an "antique soapbox" and if government speakers dominated the new soapbox, so that "speakers on the first soapbox [would] not truly have the opportunity to communicate their views even to those who might wish to hear them." *Ibid.* But no such drowning out was present in this case, the court concluded, because "Warner retains unimpeded access to the Niceville cable television viewers." *Id.* at 8a-9a.[2] After finding support for its conclusion in *P.A.M. News Corp. v. Butz*, 514 F.2d 72 (D.C. Cir. 1975), the court summed up its holding: "we need apply no balancing test to the City's action. Because Warner retains the uninfringed right to send its message to the Niceville audience, we hold that Warner's feared loss of profits, due to competition by the

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[2] The court said: "if the soapboxes are equal and the city speakers simply attract more listeners because the listeners prefer the city's message, there is no 'drowning out,' no denial of access, and no first amendment violation. . . . [T]he speaker on the first soapbox cannot demand to monopolize the information-seeking audience in the name of the first amendment." Pet. App. 8a. But the court did not say that the competition was equal here, and it *could not* have so concluded: the very gist of Warner's allegations was that the competition was *not* equal, and there was no trial on those claims. Moreover, immediately after the foregoing quote, the court pointed to Warner's "unimpeded access" as the reason for rejecting the claim of drowning out here.

City-owned system, does not constitute a first amendment injury." Pet. App. 11a.[3]

ARGUMENT

This case illustrates the harm worked by a half-correct rule of law. Acknowledging that "operation of a cable television system does implicate first amendment rights" (Pet. App. 6a (citing *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986) (*Preferred*)), the Eleventh Circuit nonetheless went on to declare that "the right to be free from competition is not within [those rights], even when the cable operator's most formidable competitor is a municipality." Pet. App. 6a. Part of this theory is unobjectionable—as a general rule, the First Amendment does not protect members of the press from competition—but part of it is seriously wrong: the First Amendment *does* protect the press against deliberate actions by government to interfere with, and to distort, the competition. Absent some strong justification, principles of free speech and free press prohibit the government from discriminating among speakers, imposing burdens on some and granting benefits to others, so as to alter significantly the balance in the marketplace for speech.

The fact that, as here, government elects to alter the marketplace in *its own* favor should be cause for more constitutional scrutiny, not less. In that situation, government is tilting the balance away from *private* control over a medium of speech towards *public* control of that medium. Even if private speakers are not displaced totally, government has succeeded, at a minimum, in expanding its own role in the selection and distribution of information to its citizens; if private speakers are actually put out of business, then government assumes ab-

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[3] The court added: "Warner would like the federal courts to prevent the City from communicating its own message to an audience that would like to receive it, thereby *decreasing* speech in the cable marketplace. We do not believe that the first amendment requires such a result." Pet. App. 11a-12a.

solute control over that particular conduit of information. Yet, even the prospect of complete displacement did not trouble the court of appeals: it held that petitioner had "fail[ed] to assert a protected first amendment interest" regardless of whether the City, by means of unequal competition, effectively forced petitioner to shut down. Pet. App. 5a.

We believe that the decision below cuts a large, and wholly unjustified, hole in the protection afforded the press from government interference. This loss of protection is especially significant for cable television—which, as this Court has said, "is, in much of its operation, part of the 'press'," *Leathers v. Medlock*, 111 S. Ct. 1438, 1442 (1991)—because cable television faces kinds and degrees of government interference not commonly faced by other members of the press. It is thus a matter of great concern when a federal court of appeals declares that a particular form of intrusion—here, the drawing away of audience through skewed competition—is immune from challenge under the First Amendment. Not only will that decision encourage cities to develop public systems with built-in preferences—and more and more cities are already beginning to do so (*see* Pet. 12 n.11)—but it will allow cities to use the threat of entry to create regulatory pressure (over, for example, the choice of programming) that is highly offensive to First Amendment values. In both doctrinal and practical terms, therefore, the issue is of sufficient importance to warrant review by this Court.

1. *The First Amendment Protects the Press From Attempts By Government to Distort Competition.*

A. The court of appeals rested its decision upon a simple principle: that a member of the press has no constitutional "right to be free from competition." Pet. App. 6a.[4] Where the court went wrong, in our view, is

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[4] As we have noted in the text, this Court has recognized that cable television "is engaged in 'speech' under the First Amendment,

not in its statement of the principle itself, but in its failure to recognize that, like most legal principles, it is not absolute. Specifically, the principle does not extend to a situation where a government alters the marketplace for speech by deliberately favoring one competitor over another. *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976) ("the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment"). Efforts by government to tip the balance of speech are just the sort of intrusive conduct that the First Amendment was meant to prohibit. *See* pages 11-12, *infra*.

To make the point clear, it is necessary to review precisely what conduct is and is not at issue here. It is not a decision by the City to allow a second operator to compete on equal terms with petitioner;[5] rather, it is a decision by the City to promote a decidedly *unequal* competition. The second cable system (operated by the City), unlike that of petitioner, would not have to pay any franchise fees, would be exempt from property, sales, and income taxes, would be able to resort to municipal funds to cross-subsidize its operations, would be permitted to pledge tax revenues to raise capital, and (because it is a public operation) would be free of the need to make a profit. Based on these advantages, the City, not surprisingly, reached the conclusion that the new system would

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and is, in much of its operation, part of the 'press'." *Leathers v. Medlock*, 111 S. Ct. at 1442. *See also Preferred*, 476 U.S. at 494-95 (noting cable's similarities not only to broadcasters but also to newspapers); *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938) ("The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion."); *United States v. Paramount Pictures*, 334 U.S. 131, 166 (1948) (films are included in the press); *FCC v. League of Women Voters*, 468 U.S. 364, 382 (1984) (broadcasting is part of the press).

[5] Petitioner apparently concedes (Pet. 5) that it would have no First Amendment claim in such circumstances.

be able to lure subscribers away from the existing system by offering lower rates. In fact, that is the unvarnished goal of the City's action: to convert subscribers from petitioner's service to its own.

It is thus utterly misguided to think (as the court of appeals apparently did) that any loss of audience suffered by petitioner is nothing more than the product of free choice by the citizens of Niceville. To put it bluntly, petitioner faces the loss of its subscribers because the City, using subsidized rates, intends to buy them off. That effort is no different, in purpose or in likely effect, from a proposal that would allow subscribers to one cable service, but not another, to deduct cable charges from their property-tax bills. Such action, by making it more costly for viewers to choose a competing service, would naturally tend to reduce its audience and, as a consequence, the effect of its speech. Yet, under the theory pursued by the court of appeals, the disfavored service would not be suffering any "first amendment injury," just an "economic loss" resulting from competition. Pet. App. 7a.

This view simply misapprehends the contours of the First Amendment. Principles of free speech and press cannot just be written off where, as here, the City uses its inherent advantages as a government to make the price of one service (here its own service) substantially lower than the price that a less-favored service can offer. Although it is literally true that the City is not prohibiting petitioner from speaking, or prohibiting anyone from listening, it is nevertheless deliberately tampering with the marketplace, making it substantially more difficult for petitioner to reach the members of its intended audience. The fact that the City, to achieve its aims, uses an inducement to listeners to forego listening, rather than a more direct ban, does not make its manipulation immune from scrutiny under the First Amendment.[6]

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[6] *See American Communications Ass'n v. Douds*, 339 U.S. 382, 402 (1950) ("the fact that no direct restraint or punishment is

Petitioner is not asserting a "right to speak" in a vacuum, but the right to reach its intended audience without unjustified government interference. When the claim is properly understood, it is plainly no answer to it for a court to say that petitioner still may speak, even while government is simultaneously engaged in trying to take away all of its listeners.[7] The point of speech, after all, is to be heard. If even some part of the audience is taken from a speaker, the speech is itself diminished, for the attempt to communicate is being frustrated. Furthermore, most regular speakers—especially those which operate a costly medium, such as a newspaper, magazine, television station, or cable system—depend economically on the presence of an audience of a certain size. If the audience is stripped away in sufficient measure, the speaker will stop speaking for lack of sufficient economic support. Taking away the means of economic support from a speaker creates every bit as real an impediment to that form of speaking as does imposition of a high tax or a physical shutting down of the distribution facility.

The basic flaw in the court of appeals' reasoning is well-illustrated by its reliance on the "soapbox" metaphor. Pet. App. 8a. In that discussion, the court recognized, quite properly, that the *physical* "drowning out"

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imposed upon speech . . . does not determine the free speech question"); *Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960) ("Freedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference."); *Healy v. James*, 408 U.S. 169, 183 (1972) (same).

[7] This can be seen (in exaggerated form) by imagining that a government offered $100 to persons planning to attend a speech in exchange for their agreement to stay away. In such a case, the government could argue, just as it does here, that it is not interfering with the right *to speak*. But it is obvious nonetheless that it has taken action to impede the ability of the speaker to communicate with his audience and, thus, the effect of the speech itself.

of another speaker—by means of "a better soapbox, equipped with spotlights and loudspeakers"—would put an unconstitutional barrier between the speaker and his audience. At the same time, it seemed oblivious to the fact that an *economic* "drowning out"—by means of biased competition aimed at capturing potential listeners—could erect a similar barrier. The explanation cannot be that the court thought that the latter conduct, but not the former, serves some important governmental interest because, quite apart from the fact that no such interest exists, the court made clear that, to defeat a First Amendment claim based on unequal competition, the City need advance no governmental interest at all. Pet. App. 11a.[8]

B. To find that petitioner is entitled to First Amendment protection here does not require the fashioning of novel principles of law. What it does require, and what the court of appeals decision does not reflect, is an understanding that the governmental conduct at issue presents a genuine threat to First Amendment values.

To begin with, as we have noted, the action proposed by the City is a classic case of government choosing to favor one speaker over another. If the favored speaker were a private individual or company, such favoritism would indisputably implicate the First Amendment, and require inquiry into the effects of and justifications for

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[8] This Court, of course, has routinely subjected burdens on speech to First Amendment scrutiny, regardless of the particular nature of the conduct challenged. *See, e.g., Riley v. National Fed'n of the Blind*, 487 U.S. 781 (1988) (burdens on charitable solicitation); *Meese v. Keene*, 481 U.S. 465 (1987) (required label on certain foreign films); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) (zoning restriction of certain theaters to less populated areas); *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788 (1985) (restriction on fund-raising access to government employees); *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983) (tax imposed on newspapers); *Grosjean v. American Press Co.*, 297 U.S. 233 (1936) (press-specific tax).

the unequal treatment: government actions that help decide which speaker and therefore what content prevail in the marketplace for speech create a First Amendment problem because of the risk that the government actions "will distort the market for ideas." *Leathers v. Medlock*, 111 S. Ct. at 1444.[9] *See, e.g., Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 229 (1987) (discriminatory tax "treat[ed] some magazines less favorably than others"); *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983) (same); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 789-92 (1978) (invalidating ban on corporate expenditures on certain public referenda); *Buckley v. Valeo*, *supra*. There is, if anything, a *greater* First Amendment problem when the favored speaker is the government itself, because the role of the government in shaping the content of the marketplace for speech is already greater and the danger of distortion is all the more present.[10]

This case also implicates related First Amendment concerns that arise whenever government action "is directed at, or presents the danger of suppressing, particular

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[9] This Court's decision in *Austin v. Michigan Chamber of Commerce*, 110 S. Ct. 1391 (1990), while upholding a ban on certain corporations' expenditures on electoral candidates, underscores the First Amendment's concern with use of government power to confer unfair advantages on one speaker over another. The Court upheld the measure only because it found a compelling state interest to support it. *Id.* at 1396-98. And the interest that it found compelling was the interest in not having a *state*-conferred advantage (the corporate form) used to obtain an "'unfair advantage in the political marketplace.'" *Id.* at 1397 (quoting *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 257 (1986)).

[10] This deliberate alteration of the marketplace offends the First Amendment even if it does not effectively drive out other speakers altogether. The district court was mistaken, therefore, in concluding that the First Amendment issue did not become "ripe" until petitioner was unable to speak at all. The court of appeals, of course, found no First Amendment issue to be raised even in those circumstances.

ideas." *Leathers v. Medlock*, 111 S. Ct. at 1447. As to the former, Warner has specifically alleged that the City decided to enter the cable business in part because of its dissatisfaction with editorial choices made by petitioner. Pet. 5. Even if the City had not made complaints about programming, however, there is present here the same danger of suppression found inherent in taxation targeted at a small number of speakers,[11] for the government's competitive attempt to diminish private communication (which has the same effect as a tax) is directed at exactly one speaker, petitioner, which is the only private cable operator in the Niceville community. Accordingly, when the City attacks petitioner's speech through biased competition, it drives the audience to the only alternative cable television—namely, that offered by the government. In that manner, the City takes a significant step toward "prescrib[ing] what shall be orthodox in politics, nationalism, religion, or other matters of opinion." *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).[12]

The risks of censorship and enforced orthodoxy—great enough while petitioner still operates a competing system—would increase dramatically if the City should ultimately succeed in making it unprofitable for petitioner

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[11] *See Leathers v. Medlock*, 111 S. Ct. at 1444 ("The danger from a tax scheme that targets a small number of speakers is the danger of censorship; a tax on a small number of speakers runs the risk of affecting only a limited range of views.").

[12] The fact that the City will influence the choice of programming by appointing members of a board, rather than by having city officials serve as the board, does little of significance to reduce the role of government in the selection of material to be presented. At most, it builds in a period of delay (until new appointments can be made) before the disapproval of the City can bring about changes in programming. And, given the fact that they are appointed by city officials, members of the board may respond immediately to expressions of unhappiness by those officials about the nature of the programming.

to continue its service. In that event, the abridgement of petitioner's speech would be absolute, for petitioner would be unable to offer its programming even to those wishing to have it; and the control exercised by the City would likewise be absolute, for the City would be able to dictate to all residents (through its continuing power of appointment to the selecting board) what programs they would have the opportunity to watch. The result would be not only plenary control by the City over ideas in the cable medium but also a substantial ability to suppress ideas in the broader marketplace for speech, especially with respect to matters at the heart of the First Amendment: for example, video coverage of local public affairs is available *only* on cable television. *See Legi-Tech, Inc. v. Keiper*, 766 F.2d 728, 733 (2d Cir. 1985) ("The evils inherent in allowing government to create a monopoly over the dissemination of public information in any form seem too obvious to require extended discussion.").

C. The First Amendment principles just discussed are, in our view, reason enough to overturn the decision below. But the role of government in operating a part of the press raises broader concerns as well: in particular, it goes a long way toward unsettling a common understanding that, as a general rule, government and the press are not one and the same.

This Court has recently reaffirmed " 'the basic assumption of our political system that the press will often serve as an important restraint on government' " and recognized that impairment of that independent check on government raises special First Amendment problems. *Leathers v. Medlock*, 111 S. Ct. at 1443 (quoting *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. at 585).[13] Such impairment of independence is nec-

[13] *See also FCC v. League of Women Voters*, 468 U.S. at 382 ("the press . . . carries out a historic, dual responsibility in our society of reporting information and of bringing critical judgment

essarily put in issue, however, when government undertakes to operate an arm of the press, for the very purpose of such an operation is to establish the government in an editorial role, putting into government hands the formerly private decisions about what material the community should receive. *See* Berzanson, *The New Free Press Guarantee*, 63 Va. L. Rev. 731, 732 (1977) ("[T]he press clause effects a separation of press from government. The principle of separation . . . is designed to ensure the independence of the press."). The City's action in the present case sharply presents those dangers, because the deliberate aim of that action is to deprive the private press—petitioner's cable operation—of large parts, if not all, of its audience and, for those citizens, to substitute the City's choices about cable content for petitioner's choices. The City's action thus threatens "one of the necessary conditions for freedom of the press"—"the absence of government attempts to replace the private sector press wtih a government press." Nowak, *Using the Press Clause to Limit Government Speech*, 30 Ariz. L. Rev. 1, 15 (1988). Yet, the City has not advanced, or been required to advance, any governmental interest to justify its conduct.

The decision by a government to own and operate part of the popular press may also bring into play at least two additional First Amendment concerns. First, because its programming choices, unlike those of private operators, should be regarded as "state action" subject to constitutional constraints, its decisions whether to carry or not to carry a particular channel—*e.g.*, a religious channel,

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to bear on public affairs"); *Mills v. Alabama*, 384 U.S. 214, 219 (1966) ("the press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve"); *Grosjean v. American Press Co.*, 297 U.S. at 250 ("A free press stands as one of the great interpreters between the government and the people.").

an "adult" channel—may raise troubling constitutional questions about censorship of particular views (and, perhaps, establishment of religion), from the viewpoint both of the audience and of program creators seeking access to the system.[14] Second, government programming decisions may raise issues about the First Amendment right of citizens not to be forced—absent sufficient justification—to contribute to speech they oppose or regard as offensive. *See Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977); *Wooley v. Maynard*, 430 U.S. 705 (1977). While much taxpayer-supported government speech is easily justified because it is part and parcel of otherwise-legitimate government programs, a quite different situation is presented by government's independent decision to establish and operate an arm of the press for no other reason than to obtain substantial and perhaps exclusive control over an important medium of communication.[15]

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[14] *Cf., e.g., Cruz v. Ferre*, 755 F.2d 1415 (11th Cir. 1985) (*direct* ban on adult programming forbidden); *Community Television of Utah, Inc. v. Wilkerson*, 611 F. Supp. 1099 (D. Utah 1985), *aff'd*, 800 F.2d 989 (10th Cir. 1986), *aff'd*, 480 U.S. 926 (1987) (same).

[15] It is this last point that shows why the authority relied on by the court of appeals, *P.A.M. News Corp. v. Butz*, 514 F.2d 272 (D.C. Cir. 1975), not only fails to support the ruling below but highlights its shortcomings. In *P.A.M.*, the court held that a private agricultural news service suffered no impairment of a cognizable First Amendment interest when the federal government adopted a newly efficient means of directly distributing to the public information that previously the private news service had obtained from the government and published. *Id.* at 277-78. But all that was at issue was the distribution of information that was already *government* information. Here, of course, the City of Niceville is generally entering the cable business as a full-service competitor, showing programs obtained largely from private sources and perhaps creating its own programming specifically for this purpose, all to be offered as a full-scale substitute for petitioner's own cable service. Moreover, whereas the D.C. Circuit specifically noted that the case before it did not involve any *unfair* competitive methods (*id.* at 277 n.8), the present case does involve allegations that the government is using special advantages to compete for petitioner's subscribers other than on the merits.

All of these problems arise unavoidably as a consequence of a decision by a governmental body to become part of the press. Yet, despite these problems and despite the fact that the City also decided to stack the deck in order to draw as much audience away from petitioner as possible, the court of appeals saw no grounds for challenge under the First Amendment. That view represents a fundamental misunderstanding about the scope of constitutional protection, and it should not be allowed to stand.

2. *The Decision Below Allows Governments to Exert Unwarranted Control Over Cable Television.*

The doctrine announced by the court of appeals raises concerns that go well beyond the circumstances of this particular case. Because cable television is a relatively recent addition to the ranks of the press, and because the scope of its constitutional rights has not received anything approaching final definition (*see, e.g., Preferred*), government officials at all levels have been far more ambitious in exerting regulatory control over cable television than over most other providers of speech. We acknowledge, of course, that some forms of regulation may be justified by special properties of cable television; but we believe, as well, that any regulation must be subject to full and careful scrutiny to determine whether it ultimately passes muster under the First Amendment.

The decision in this case, regrettably, stands for precisely the opposite proposition. Not only did the court below find no First Amendment *violation*, it found no First Amendment *issue*. It is hard to imagine a court overlooking a First Amendment problem if a City decided to compete directly with its local newspaper, using its inherent advantages as a sovereign to sell the "public" paper at a nominal price. Nonetheless, in the context of a cable television service, the Eleventh Circuit saw only the give-and-take of a competitive market, not (as it should have) an interference by the City with the distribution of speech.

The practical effect of that mistaken perspective is to give cities enormous, and quite unwarranted, power over cable television. Most directly, if the decision below stands, cities within and without the Eleventh Circuit will be encouraged to establish public cable systems as an alternative to private cable systems.[16] As we have indicated, the idea of a "public" press itself seems inconsistent with the First Amendment—even if the competition could be made exactly equal—but, in fact, the competition will not be equal. If cities are free to do what Niceville proposes to do here, it is difficult to see how private systems, forced to operate without the advantages enjoyed by the public system, can keep their viewers from being drawn away.

The problem for private cable systems does not depend, however, on the existence of actual competition from public cable systems. Given the advantages available to public systems, a private system must necessarily be aware of the *threat* presented by such competition. Because cable systems operate under franchises granted by local governments, and are thus subjected to continuous regulatory oversight, that threat will give local authorities considerable added leverage over the operations of private systems. For example, if programming decisions displease local officials—as they apparently did in Niceville—those officials may use the prospect of operating a subsidized public system as an indirect method of bringing about changes on the private system. The effect would be to give local governments increased sway over cable television whether they ultimately choose to develop their own systems or not.

This power, whether exercised directly or indirectly, remains fundamentally illegitimate: the First Amendment protects the press, including cable television, from attempts by government to distort the marketplace for

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[16] Niceville is one of a growing number of cities that have decided to establish public cable systems in recent years. *See* Pet. 12 n.11.

speech. The decision of the Eleventh Circuit to the contrary represents an important and troubling departure from this principle, and this Court should review it.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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